TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY, ET AL., PETITIONERS,

vs.

BARNEY E. GASKILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 6, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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—7157

[fol. a]

[Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT IN AND FOR THE STATE OF NEBRASKA, OMAHA DIVISION

No. 42 Civil

BARNEY E. GASKILL, RALPH T. NICHOLS, WILLIAM A. COSSIART, Earl R. Farmer, Albert B. Benson, George O. Gill, John P. Lewis, Marvin V. Bergland, Clem Miller, Frank E. Faris, Melvin Perrine, Arthur L. Holtzman, Charles Ihlenfeld, Fred H. Goodhart, William J. Alfson, Arthur C. Langhrey, Ross A. Allen, Lloyd L. Bloomer, Harry E. Moolick, Harley W. Porter, Frank Patterson, James A. McCarthy, Frank E. Swearingen, Gail L. Malmquist, Charles F. Strahan, Clyde C. Finley, William R. Bitney, Leo V. Gildea, Ura C. Fox, Bertram E. Biernes, Chan E. Wood, Arthur E. Skoog, John H. Zeissler, John H. Mordhurst, LeRoy S. Wilkins, Richard A. Grauel, Patrick F. Carney, Charles E. Degallez, Glenn R. Nesbit, and Glenn A. Moore, Charles Russell, Plaintiffs,

vs.

CHARLES P. MEEGAN, Trustee for the Chicago and Northwestern Railway Company, a corporation, and George Kimball, (both non-residents), Defendants

PETITION—Filed May 8, 1939

[fol. 2] Come now the plaintiffs and for cause of action against the defendants and each of them states:

1. That all of the plaintiffs are residents of the State of Nebraska, and were at all times hereinafter mentioned employees of the defendant railroad company, The Chicago & Northwestern Railway Company, which was a corporation organized under and by virtue of the laws of the State of Illinois, and is an Illinois corporation with its principal place of business in the City of Chicago, and that it is now in process of reorganization under the National Bankruptcy Acts, and the defendant, Charles P. Meegan has been appointed trustee under order of the United States District

Court in the City of Chicago, and all these plaintiffs are still in the employ of said Charles P. Meegan, trustee.

2. That said bankruptcy court in the United States District Court at Chicago passed a general order, which is now enforced, authorizing all suits which formerly affected the Chicago & Northwestern Railway Company, and all suits affecting the present trustee to be brought in the name of said trustee in any court of competent jurisdiction either State or Federal, with like force and effect as though said proceeding was presented before the bankruptcy court, or as though said railroad company was not in process of reorganization in said bankruptcy court.

3. That all of said plaintiffs entered the service of the Chicago & Northwestern Railway Company as trainmen at various times, operating on trackage, which is now known as the Nebraska Division, but which has been known by different names at different periods, and have been employed in said capacity until the present time, and the defendant railroad company, and its trustee now operating its business is an interstate railroad maintaining and operating railway lines throughout the state of Nebraska, with its principal office at Chicago, Cook County, Illinois.

4. That said plaintiffs are some of them members of what is known as the "Order of Railway Conductors" a voluntary association of men employed, organized for the purpose of bettering themselves as to their wages and better working conditions. That part of said plaintiffs are members of another such voluntary association known as [fol. 3] the "Brotherhood of Railroad Trainmen" a [similiar] organization, and several of said plaintiffs formerly belonged to said unions and have dropped out for various reasons, and some never did belong to either of said unions or any other railroad employees organization.

5. Plaintiffs further state that during all the time that these employees have been working for the railroad company and its trustee they have been working under written contracts, referred to sometimes as the "Schedule of Wages and Rules of Compensation for Conductors and Trainmen", and later said contracts were separated with reference to ...ainmen and railroad conductors. That during all of said time, however, said written contracts provided that the said employees shall have what is known as seniority rights with

reference to said employment. That said contracts at all times provided, "that the seniority rights of trainmen shall date from the time that they are employed as such, and that in promoting men to conductors the senior men will be first examined, and that the seniority rights of a conductor shall date from the day of his promotion, and that the men shall be allowed their choice of runs on the basis of such seniority, which shall be confined to the division on which they hold rank." Said contract further provided at all times "that at the end of each year the superintendent of the railroads should prepare seniority lists, a copy of which should be published on the division bulletin board and copies [whould] be furnished the local chairman of the Order of Railway Conductors and the Brotherhood of Railroad Trainmen. And senior trainmen applying for runs shall be assigned to said runs, further providing, that when trainmen operate over more than one division involving more than one seniority districts percentage of miles run over each division will govern in assignment to such runs."

6. These plaintiffs further state that while these agreements were made between the railroad company and the voluntary association above referred to, they were made for the use and benefit of all employees irrespective of whether they were union men or not, and said contracts always specifically provided "that said rules and regulations constitute in their entirety an agreement between the [fol. 4] Chicago & Northwestern Railway Company and its conductors and trainmen." And all the plaintiffs have been throughout their employment, treated alike with reference to said rules and regulations, except as is hereinafter complained of in this controversy.

7. Plaintiffs further state that they belong to what is known as the Nebraska Division of Trainmen, in the employ of the Chicago & Northwestern Railway Company and its trustee, and the defendant George Kimball, another employee of the Chicago & Northwestern Railway Company, and its trustee, but belongs to what is known and designated as the Sioux City Division of defendants trainmen, and he is a non-resident of the State of Nebraska, and is a resident of the State of Iowa, residing at Sioux City, Iowa, and he is made a defendant here as a representative of said division, for the reason that the numbers vary and the names are unknown, so that he may if he so desires

represent said Sioux City Division of Railway Trainmen and Conductors.

8. Plaintiffs further state that the controversy arises over the division of seniority rights between the Nebraska Division to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs, over the Northwestern road from Omaha, Nebraska to Sioux City, Iowa. That the trains as run between these two points compromise interdivisional runs, by reason of the fact the trains move over 31.3 miles of the Nebraska Division, or 30.7 per cent of the distance between the two points Omaha and Sioux City, Iowa, and that said runs move over 70.4 miles over the Sioux City Division or 69.3 per cent of the distance between two points. The Nebraska Division covering the mileage from Omaha to Blair, Blair east to Missouri Valley and back to Omaha, while the Sioux City Division covers the trackage from Missouri Valley to California Junction and northerly to Sioux City, Iowa.

9. Plaintiffs, alleging that when trains are operating over two or more seniority districts that conductors and brakemen on the district involved, are entitled to seniority rights on mileage percentage basis on miles run over each seniority district.

[fol. 5] 10. Plaintiffs further state that during all the times that these plaintiffs were in the employ of the defendant company, prior to May 1, 1930, this was the basis upon which the seniority rights were recognized and enforced, but that on said May 1, 1930, the defendant railroad company and its successor defendant trustee has refused to assign to plaintiffs any of the work over said trackage between the two said points above referred to, although they have been frequently requested so to do, but on the contrary have given to the Sioux City Division all of said work, which should have been divided proportionately as above alleged between the Sioux City Division and the plaintiffs herein, although the plaintiffs have at all times been on the regularly assigned list showing their seniority rights.

11. These plaintiffs have been ready and willing at all times to perform said train service over the Nebraska Division between Omaha, Nebraska, and California Junction, Iowa, and the work between Omaha, Nebraska and Sioux City, Iowa, on said interdivisional train runs.

12. The plaintiffs further state that the defendant railroad company and its trustee now representing it, claim that the rights herein sought to be enforced by the plaintiffs under their seniority rights privileges have been abrogated by an alleged agreement between the said defendant railroad trainmen, and the order of Railway Conductors above referred to, which the new alleged agreement they claim has cut off the rights of plaintiffs to their proportionate share of the work as herein complained of, but these plaintiffs allege that they were not parties to said agreement, that if such an agreement was entered into they had no knowledge of said agreement, were not present or represented when said agreements were made, and therefore, any attempted agreement purporting to deprive them of their seniority rights which are property rights belonging to each individual employee would be and is unconstitutional and in violation of the Fifth Amendment of the Federal Constitution, which would deprive them of their property without due process of law, and is, therefore, null and void as to them:

[fol. 6] 13. Plaintiffs further allege that on account of the wrongful deprivation by the defendant and said railroad of their seniority rights they have been damaged, and the value of their property rights in said seniority rights have been taken away, in a sum far in excess of the sum of $3000.00, exclusive of interest and costs, to each of said plaintiffs herein.

14. Plaintiffs further allege that they have sought to have their rights protected through the Brotherhood of Railroad Trainmen, and Order of Railway Conductors but that said organizations have denied them any relief.

15. Plaintiffs further allege that they have even taken the matter of their deprivation of their seniority rights before the Railroad Labor Board, and that the Labor Board have denied them any relief upon the ground that they have no jurisdiction to adjust the matter in controversy.

16. Plaintiffs further allege that they have no adequate remedy at law in bringing individual suits on behalf of each of them, for the reason that it would involve the necessity of making all the other parties either plaintiffs or defendant, and would involve a multiplicity of suits when all the rights can be determined in one suit.

17. Plaintiffs further allege that in order to determine the exact amount of damages that each have sustained on account of the wrongful acts herein complained of, it will be necessary to make an audit of the Chicago & Northwestern Railway Company records, and those of the defendant trustee, and the plaintiffs allege that they have such records showing the precise moving of all this freight over the various areas complained of, and who moved said freight.

18. Plaintiff's further allege that during the time of the Federal Control of Railroads during the World War an arrangement was made between the Chicago & Northwestern Railway Company and the Chicago, St. Paul, Minn. & Omaha Railroad, which operated a system from Omaha to Sioux City on the Nebraska side, whereby that order jointly gave both the M. & O. & N. W. Freight to avoid excessive switch charges, the agreement providing that the M. & O. shall get 25% of the joint carriage of [fol. 7] freight, and the Northwestern 75%, and as to this arrangement the plaintiffs make no complaint, but it will be necessary to take that matter into consideration in order to determine the rights of plaintiffs, as plaintiffs, contend that their seniority rights should be applied so as to allow them 30.7% of the 75% which under said contract represents the Northwestern freight traffic.

19. Plaintiffs further allege that the seniority lists above referred to which have been yearly prepared and published by the railroad company and its trustee above referred to gives the names of all the employees in the Nebraska Division together with the dates of their seniority.

Wherefore, plaintiffs pray that they be entitled to their seniority rights as herein set forth, and that an accounting be had of the amounts due the various plaintiffs herein in the order of their seniority rights, and that the defendants be compelled to produce the records of the railroad company showing the traffic handled in the matter in controversy, and by whom handled, and amount of work performed, and that an audit be made, or a referee be appointed to determine the amounts due the various plaintiffs, and that judgment be rendered against the defendants, in favor of each individual plaintiff for the amount found due him, and that in the future the railroad or its trustee be compelled to assign to the plaintiffs in the order of their senior-

ity their rights to operate on the runs in controversy, and that the defendant George Kimball, representing the Sioux City, Iowa, Trainmen Division be compelled to recognize plaintiffs seniority rights in said work by the Sioux City Division, which has resulted in [lose] of time and money to the plaintiffs, and that they be reimbursed for said time and money lost as herein prayed, and the defendants also be compelled to recognize said rights until said rights shall be rightfully terminated by the parties hereto, and that they have such other and further relief as may be just and equitable in the premises.

George P. Burger, 313 Patterson Bldg., Omaha, Nebr., & S. L. Winters, 4811½ So. 24th St., Omaha, Nebr., Attorneys for Plaintiffs.

Duly sworn to by Barney E. Gaskill, jurat omitted in printing.

[fol. 8] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF CHICAGO AND NORTHWESTERN RY. CO.—Filed May 29, 1939

Comes now Chicago and North Western Railway Company, Debtor, Charles P. Megan having resigned as Trustee, and Debtor having been ordered by the Bankruptcy Court to carry on until a new Trustee is qualified, and for answer to the petition of plaintiffs filed herein admits the reorganization proceedings under which the Chicago and North Western Railway Company is operating, as alleged in Paragraph 1 of the petition.

II

Admits that said Railway Company operates interstate and has its principal office at Chicago, Illinois.

III

This defendant has no knowledge as to whether the plaintiffs are or are not members of the Brotherhood of Railroad

[fol. 9] Trainmen or Order of Railway Conductors, and, therefore, neither admits nor denies the allegations of Paragraph 4 of plaintiffs' petition, but calls for strict proof thereof.

IV

This defendant admits, as claimed in Paragraph 5 of the plaintiffs' petition that to whatever extent the plaintiffs have worked for the Railway Company or its Trustee, their work was in accordance with an agreement or agreements between the Chicago and North Western Railway Company and the Order of Railway Conductors, for conductors, and the Brotherhood of Railroad Trainmen, for trainmen, generally referred to as Schedule of Wages and Working Conditions as same have existed from time to time, and that said agreements provide for seniority rights in connection with such employment as specifically set forth therein. This defendant alleges affirmatively that plaintiffs and each of them had and have only such seniority rights as may be provided for in said agreements between the unions referred to and the railway company and its trustee, and that apart from such agreements none of the plaintiffs has any seniority rights; that said agreements were not negotiated between the plaintiffs individually and the Railway Company, but between the said unions and the Railway, said unions representing each and all of said classes of employees, whether members of the unions or not; that said unions were and are the sole bargaining agencies of said plaintiffs whether members of the unions or not; that said agreements and contracts were voluntarily made between the unions and the railway company and its trustee, and were and are subject to change and modification, and that to whatever extent the individual plaintiffs have been deprived of any runs, if any, said result was brought about and produced because of supplementary agreements and understandings and arrangements made by the said unions and the said railway company and its trustee which constituted change and modification of said agreements and the obligations and changes and modifications were and are binding upon the plaintiffs and each of them.

[fol. 10] V

For answer to Paragraph 6 of plaintiffs' petition, the Railway Company and its Trustee admit that said agree-

ments and schedules referred to were made for all of the employees in said classes, regardless of whether they belonged to the unions or not.

VI

For answer to Paragraph 7 of the plaintiffs' petition, this defendant neither admits nor denies the allegations thereof.

VII

For answer to Paragraph 8 of plaintiffs' petition, this defendant denies the contention that the track between Omaha and Blair is any part of the Nebraska Division of the Chicago and North Western Railway Company, but alleges that said trackage is owned and operated by Chicago, St. Paul, Minneapolis and Omaha Railway Company; that the only part of the Nebraska Division referred to in plaintiffs' petition and which is involved in this case is 7.5 miles from Blair, Nebraska, to California Junction, Iowa; that from California Junction, Iowa, to Missouri Valley, Iowa, a distance of 5.9 miles, and from California Junction to Sioux City, Iowa, a distance of 69.4 miles, the track is in the Sioux City Division, all as appears from the time tables of the Chicago and North Western Railway Company issued for the guidance of employees; that the definition of a division as promulgated in the book of rules of the Chicago and North Western Railway Company at Page 8 is a section of track under the jurisdiction of a superintendent, and no part of the Chicago, St. Paul, Minneapolis and Omaha Railway Company's track between Omaha and Blair is under the jurisdiction of any superintendent of the Chicago and North Western Railway Company, but is under the exclusive jurisdiction of the superintendent of the Chicago, St. Paul, Minneapolis and Omaha Railway Company.

VIII

For answer to Paragraph 9 of plaintiffs' petition, this defendant admits this to be the generally recognized practice.

[fol. 11] IX

For answer to Paragraph 10 of plaintiffs' petition, this defendant denies the allegations thereof, but alleges that

any and all claims of plaintiffs involving runs and wages accruing more than four years before the filing of this suit are barred by the Statute of Limitations of the State of Nebraska. This defendant further alleges that whatever division of work and wages was made as regards employees of the Nebraska Division as compared to employees of the Sioux City Division, was made pursuant to and in accordance with agreements entered into between the Railway Company and the unions referred to, which agreements are binding upon the plaintiffs and each of them, said unions being recognized as the only bargaining agencies for said plaintiffs, whether they belong to the unions or not.

X

For answer to Paragraph 11 of plaintiffs' petition, this defendant again says that from Omaha to Blair, Nebraska, is not within the Nebraska Division of the Chicago and North Western Railway Company, and that otherwise the facts are as set forth in the previous paragraph hereto.

XI

For answer to Paragraph 12 of plaintiffs' petition, this defendant admits that his contention is that the rights of plaintiffs are to be determined by the agreements made by the Railway Company and the unions referred to, and that such agreements are binding upon the plaintiffs and each of them, whether they belong to the unions or not, and this defendant denies that such agreements violate any of the constitutional rights of plaintiffs, and that the fifth amendment to the Federal Constitution has no application as claimed in said paragraph.

XII

For answer to Paragraph 13 of plaintiffs' petition, this defendant denies that there is involved the sum of $3,000.00 as to each plaintiff; that the petition does not set forth any facts to warrant the conclusion that there is such an amount involved, and this defendant, therefore, denies the jurisdiction of the Court in this case.

[fol. 12] XIII

For answer to Paragraph 14 of the plaintiffs' petition, this defendant is informed and believes that the Brother-

hood of Railroad Trainmen and the Order of Railway Conductors duly considered the individual viewpoint of these plaintiffs in determining what agreements to make with said Railway Company, but notwithstanding that any of such viewpoints may have been contrary to the judgment of said Brotherhood officers, said agreements were made with the Railway Company by said unions, and such agreements are binding upon the plaintiffs and each of them, and such decision does not deny the plaintiffs of any rights, but in fact establishes and defines their rights with respect to seniority.

XIV

For answer to Paragraph 15 of plaintiffs' petition, this defendant admits that it is informed that the plaintiff Gaskill made an application to the First Division, National Railroad Adjustment Board in Chicago for an award concerning the contention of the plaintiffs, but that said Adjustment Board declined to make such award and also declined to docket the complaint, and this defendant says that since said tribunal is constituted by an Act of Congress regulating relation between the railroad companies and the employees and authorizing the bargaining agencies of said employees, to-wit: the unions referred to, to agree upon the schedules, including the definition and application of seniority rights, and since said subjects were agreed upon between the unions and the railway company, said action of the Adjustment Board in declining to docket the Gaskill complaint and the complaint of these plaintiffs was within the jurisdiction of said Board and is binding upon the plaintiffs, and does not deny them any of their rights, nor entitle them to resort to a court of law or equity, notwithstanding the action of the unions and of the Adjustment Board.

XV

For answer to Paragraph 16 of plaintiffs' petition, this defendant says that if plaintiffs have any rights against this defendant upon the claims made in their petition, it is better that they be adjudicated in one suit rather than [fol. 13] in many, but still this defendant denies that the Court has any jurisdiction under all the facts in this case.

XVI

For answer to Paragraph 17 of plaintiffs' petition, this defendant says that it would be inequitable and unjust to order an audit of the books of the Railway Company, except at the sole expense of plaintiffs; that plaintiffs ought to set forth in a bill of particulars their specific demands as separately prayed for in a motion filed herein, but that in any event, if any audit of defendant's books and records is necessary that the Court will first order that the plaintiffs pay in advance such sum of money as may be necessary to make said audit, so that defendant will not be burdened with unreasonable expense in the premises.

XVII

For answer to Paragraph 18 of plaintiffs' petition, this defendant denies that the arrangement between the Chicago and North Western Railway Company and the Chicago, St. Paul, Minneapolis and Omaha Railway Company for the handling of freight was made during the World War, and alleges the fact to be that an arrangement was initiated on August 1, 1926, being an agreement between the two railway companies under the provisions of which Chicago and North Western and Chicago, St. Paul, Minneapolis and Omaha tonnage was handled between Sioux City and Omaha via Missouri Valley and Council Bluffs solely on the tracks of the Sioux City and Iowa Divisions of the Chicago and North Western Railway, none of such trackage being a part of the Nebraska Division. Effective May 1, 1930, and also by agreement between the two companies, the method of operation of trains between Sioux City and Omaha was changed from the route via Missouri Valley and Council Bluffs over trackage of the Sioux City and Iowa Divisions to a route via California Junction and Blair, a route involving Sioux City Division trackage, Sioux City, Iowa, to California Junction, Iowa, 69.4 miles, Nebraska Division trackage California Junction to Blair, a distance of 7.5 miles, and C. St. P. M. & O. trackage Blair to Omaha, a distance of 21.8 miles, and alleges the fact that subsequent to such changed operation an agreement was also made between the unions [fol. 14] and the Railway Company effective as of May 1, 1930; that on account of the freight which theretofore had been hauled exclusively by the Chicago, St. Paul, Minneapolis and Omaha Railway Company on its own tracks west of the

Missouri River between Omaha and Sioux City being diverted over the Chicago and North Western Railway Company's tracks between Blair and Sioux City that a certain number of employees (conductors and trainmen) of the Chicago, St. Paul, Minneapolis and Omaha Railway should be entitled to operate over the Sioux City Division of the Chicago and North Western Railway Company, between Sioux City and California Junction, and the Nebraska Division of the Chicago and North Western Railway Company, between California Junction and Blair (a distance of 7.5 miles), and said agreement has been modified from time to time between the Railway Companies and the labor unions referred to, all of which agreements are binding upon these plaintiffs, as well as the agreements as to the assignment of runs as between Sioux City Division men and Nebraska Division men of the Chicago and North Western Railway Company, and that all of said agreements between the unions and the railway company are binding upon these plaintiffs.

XVIII

For answer to Paragraph 19 of plaintiff's petition, this defendant admits that from time to time seniority lists have been prepared and published on each of the divisions of the Railway Company, including the Nebraska Division thereof.

Wherefore, this defendant prays that the members of the Sioux City Division of the Chicago and North Western Railway Company which may be specified by the plaintiffs in their bill of particulars or otherwise designated as those who received work and wages which plaintiffs claim rightfully belonged to them, be made parties to the suit, and that if any final judgment is rendered in this case, it be rendered against such parties who received such work and wages, rather than against this defendant who has paid said wages in accordance with agreements between the bargaining agencies of the plaintiffs, and the Sioux City Division men.

[fol. 15] Defendant further prays that the Order of Railway Conductors and the Brotherhood of Railroad Trainmen be made parties defendant, and that all of said additional parties be duly served with summons to the end that they may appear and make such answer as they may be advised in the premises.

Defendant further prays the Court that the complaint of plaintiffs be dismissed for want of equity, and that judgment be rendered in favor of this defendant, for its costs herein expended.

Wymer Dressler, Robert D. Neely, H. J. Lutz, Attorneys For Defendant, Chicago and North Western Railway Company, Debtor.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER MAKING BROTHERHOOD OF RAILROAD TRAINMEN AND ORDER OF RAILWAY CONDUCTORS PARTIES DEFENDANT—Filed May 29, 1939

It appearing from the answer of the defendant that the Brotherhood of Railroad Trainmen and the Order of Railway Conductors are vitally interested in the result of this suit, and should be made parties so that they may defend their interest therein,

It Is Ordered that the Brotherhood of Railroad Trainmen and Order of Railway Conductors be and they hereby are made parties defendant in this case. A copy of this order will be served in the usual way upon the nearest officer of each of said organizations.

J. A. Donohoe, United States District Judge.

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT, GEORGE KIMBALL, TO DISMISS AS TO HIM—Filed June 16, 1939

The defendant, George Kimball, moves the Court as follows:

1. To dismiss the action as against said defendant because the petition fails to state a claim against said defendant upon which relief can be granted.

2. To dismiss the action as against said defendant because the petition shows on its face that the Court is without jurisdiction of the subject matter, in that the petition does not allege facts sufficient to satisfy the requirements of Rule 23 of the Rules of Civil Procedure for the District Courts of the United States, so as to permit said plaintiffs as individuals or as a class to sue said George Kimball as the representative of a class, and that any judgment in favor of any one or more of said plaintiffs against said defendant as the representative of a class would be unenforceable against him as such representative, or any of those whom he is alleged to represent.

3. To dismiss the action as against said defendant because the petition shows on its face that the controversy described therein is one within the jurisdiction of the First Division of the National Railroad Adjustment Board created and acting pursuant to the provisions of the "Railway Labor Act" (U. S. C. A. Title 45, Sec. 151, et seq.), and that the petition does not allege facts sufficient to show that plaintiffs have exhausted their remedies granted by and existing pursuant to said "Railway Labor Act," in that the dispute was one wherein the "Railway Labor Act" gives either party a right of appeal to the National Railroad Adjustment Board as a whole, and also in that no reference of the controversy was ever attempted to be made to the National Mediation Board or to any Arbitration Board thereof, whose awards are appealable to the Federal District Courts, and that the facts alleged do not establish that plaintiffs ever exhausted all their rights and remedies under the collective bargaining contracts between their duly authorized agents and the defendant Railroad, which contracts were duly made, are in force, and are enforceable pursuant to the provisions of said "Railway Labor Act;" and that in [fol. 17] any event if plaintiffs have properly and fully sought and been denied all available relief under said contracts and under said "Railway Labor Act," the petition does not allege sufficient facts to establish other than that the decisions made pursuant to said contracts are final and binding or that the National Railroad Adjustment Board acted other than regularly, lawfully and within the scope of its authority, so as to make its actions and ruling that these plaintiffs were entitled to no relief in the premises whatever be not subject to review by this Court, and that this Court is therefore without jurisdiction of the subject matter.

4. To dismiss the petition as against said defendant because the petition fails to state a claim against said defendant upon which relief can be granted, in that the petition does not allege any justiciable controversy measurable in money between any one or more of said plaintiffs and the said defendant, in that no amount of money is alleged to be due and owing from said defendant to any one or more of said plaintiffs, and that the petition does not otherwise allege any cause of action against said defendant whereby any one or more of said plaintiffs, individually, collectively or as a class, are entitled to any other relief against said defendant.

5. To dismiss the action as against said defendant on the ground that the Court lacks jurisdiction because the amount actually in controversy as to said defendant is less than $3,000, exclusive of interest and costs, in that if any one or more of said plaintiffs have any cause of action against said defendant such would be only to the extent that said defendant may have wrongfully received particular work, wages and seniorities which one or more of said plaintiffs were entitled to, and even if such were properly pleaded they would constitute separate causes of action of the particular plaintiffs so damaged, and would be causes arising under and at different and varying times, circumstances and facts, which causes of action could not properly be joined in one action against said defendant, and neither would any one of said causes nor all against said defendant combined, equal or exceed $3,000 in amount, but that the petition shows on its face that the controversy of amount is colorably and fictitiously stated, in that such amount can only exceed $3,000 by improperly aggregating [fol. 18] and joining the different and separate claims of many plaintiffs alleged to exist against many [indivisuals], which individuals are sought to be brought within the jurisdiction of this Court solely by an action which fails to satisfy or come within the requirements of a class action as defined by the Rules of Civil Procedure applicable to this Court.

Dated June 16th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grim, (Cedar Rapids, Iowa.) Attorneys for Defendant, George Kimball—Address 637 Omaha Nat. Bk. Bldg., Omaha, Nebraska.

NOTICE OF MOTION

To S. L. Winters and George P. Burger, Attorneys for Plaintiffs, and

To Wymer Dressler, Attorney for Defendant, Charles P. Megan, Trustee for the Chicago and Northwestern Railway Company:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office Building, Omaha, Nebraska, on the — day of —, 1939.

Dated June 16th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grim, (Cedar Rapids, Iowa.) Attorneys for Defendant, George Kimball—Address—637 Omaha Nat. Bk. Bldg., Omaha, Nebraska.

[fol. 19] Service of the above notice and motion, and receipt of copy thereof, acknowledged this 16th day of June, 1939.

George Burger, S. L. Winters, Attorneys for Plaintiffs. Dressler & Neely, Attorneys for Defendant, Charles P. Megan, Trustee.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS ORDER OF RAILWAY CONDUCTORS AND BROTHERHOOD OF RAILROAD TRAINMEN TO DISMISS—Filed September 5, 1939

The defendants Order of Railway Conductors and Brotherhood of Railroad Trainmen move the Court as follows:

1. To dismiss the action because the petition fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action because the petition fails to pray for any relief which is within the power of the Court to grant on the facts as alleged in the petition.

3. To dismiss the action because the petition shows on its face that the Court is without jurisdiction of the subject matter, in that the petition fails to allege facts sufficient respectively to establish that plaintiffs have any enforceable rights in the premises or that they have complied with the mandatory requirements of, or procedure under, the collective agreements, or that plaintiffs have exhausted either their remedies under the collective agreements between the defendant railroad and the defendant unions as the sole collective bargaining agents for those classes and crafts of the said railroad's employees, which include the plaintiffs, or their remedies under the Railway Labor Act.

(a) In Paragraph 14 of the petition plaintiffs allege "they have sought to have their rights protected" through the defendant unions and been denied relief. But plaintiffs [fol. 20] do not allege that they have made proper and sufficient application for relief pursuant to the terms and conditions of the binding collective agreements, or that any relief to which they were entitled thereunder has in any way been wrongfully or improperly denied them, or that such rights and remedies were not so limited as to now be extinguished or barred by the same instrument, and valid procedure thereunder, as first gave rise to such limited rights. That said deficiencies in plaintiffs' allegations are not merely technical defects in pleading but go to the substance of the Court's jurisdiction of the subject matter in that it sufficiently appears from the petition, and a sufficient allegation could not be made without establishing, that (1) such action as was taken by the plaintiffs with said unions and under said agreements was not in compliance with said collective agreements and did not serve to initiate or carry forward any recognizable claim but was confined solely to an unauthorized and invalid attempt to have set aside a valid and binding decision duly made pursuant to said agreements on a controversy initiated by and being solely between employees of the Sioux City Division of the Chicago and Northwestern Railway Company and employees of the Nebraska Division of the Chicago and St. Paul, Minneapolis and Omaha Railway Company as to their respective rights to certain runs of a pooled freight service of said two railroads, parts of which were over the tracts of both of said railroads; (2) that such an attempt by the plaintiffs did not comply with the conditions or the pro-

cedure provided for in said agreements for invoking the jurisdiction of the tribunals within the Unions, so as to make it possible for the plaintiffs to exhaust their remedies pursuant thereto; (3) that said controversy wherein the plaintiffs ineffectively attempted to intervene was one primarily between two groups of employees which did not include these plaintiffs, and was not a dispute between a carrier and its employees, and hence was a dispute not within the jurisdiction of the First Division of the National Railroad Adjustment Board under the provisions of the Railway Labor Act; (4) that the claims of the plaintiffs involved a totally different dispute, in that it was one between the carrier and a group of its employees, who are not the employees involved in the first above mentioned dispute, and [fol. 21] that the difference in the disputes is such that the latter was one which might have been within the jurisdiction of said National Railway Adjustment Board; (5) that plaintiffs, instead of validly initiating their own proceedings on said last mentioned controversy and carrying the same through the various procedures, as required and provided for under said collective agreements, and then to the proper tribunal acting pursuant to the Railway Labor Act, chose instead to attempt to carry the other dispute between the other parties to the said Adjustment Board, which dispute was, as aforesaid, one which had been validly and conclusively determined by the tribunals provided for in the collective agreements and was a dispute as to which said Adjustment Board was without jurisdiction of the subject matter; and (6) that all rights ever possessed by plaintiffs in the premises were by virtue of, and limited by, the collective agreements which are binding on the plaintiffs, and the petition on its face shows that by valid decisions under, and provisions of, said agreements, which constitute a part of the limitations applying to said rights, such rights have been validly [extinquished] or have not ripened into a cause of action of which this Court has jurisdiction.

(b) Plaintiffs in Paragraph 15 of the petition allege "that they have even taken the matter of their deprivation of their seniority rights before the Railroad Labor Board and that the Labor Board have denied them any relief upon the ground that they have no jurisdiction to adjust the matter in controversy."

Since long prior to any action by plaintiffs under the Railway Labor Act there has been no body or Board known

as, or with the powers formerly held by, the Railroad Labor Board, and such allegation is wholly insufficient to establish that any dispute, which the plaintiffs had a right to submit to any body or Board acting pursuant to the provisions of the Railway Labor Act, had been duly submitted to any such body so as to properly and validly invoke the jurisdiction of any such body or Board, or that all the remedies open to the plaintiffs under and pursuant to the Railway Labor Act have in any manner been properly presented or exhausted. That said deficiencies in plaintiffs' [fol. 22] allegations in Paragraph 15 of the petition are not merely technical defects in pleading but go to the substance of the Court's jurisdiction of the subject matter in that it sufficiently appears from the petition, and a sufficient allegation could not be made without establishing, that, after first seeking relief in the State Courts of Nebraska and being denied the same because of such Courts' lack of jurisdiction of the subject matter, plaintiffs sought relief from the First Division of the National Railway Adjustment Board under the Railway Labor Act which was denied for lack of jurisdiction, for the reason that the controversy presented was one which had rightfully, and with full and exclusive jurisdiction, been decided conclusively by and pursuant to the collective agreements between the unions and the employer, and that in such cases any other relief which might be available under the Railway Labor Act was "a subject matter to be handled under other provisions in the Act" than those invoked by the plaintiffs and which were provisions not within the jurisdiction of the said First Division of the National Railway Adjustment Board; that such other relief included reference of the controversy, when duly and properly presented, to the National Mediation Board created and acting by and pursuant to the provisions of the Railway Labor Act, and that no attempt whatever has been made by the plaintiffs to refer their controversy to said Mediation Board or in any other way to exhaust all their remedies under the Railway Labor Act, so as to make it possible for this Court to have jurisdiction of the subject matter presented by plaintiffs' petition.

4. To dismiss the action because the Court is without jurisdiction of the subject matter, in that the petition does not allege sufficient facts to establish that the decisions and rulings made pursuant to the collective agreements were

not final and binding on the plaintiffs and within the exclusive jurisdiction of the tribunals deciding the same, or that the national Railway Adjustment Board and said other tribunals did not act regularly, lawfully and within the scope of their authority so as to make such actions and rulings that the plaintiffs were entitled to no relief whatever in the premises and that the plaintiffs had not ex-
[fol. 23] hausted their other remedies be not subject to review by this Court.

5. To dismiss the action for failure of the petition to state a cause of action within the jurisdiction of this Court, in that the petition does not allege sufficient facts to establish that plaintiffs have any rights other than those limited rights which exist by virtue of the collective agreements made for them by their bargaining agents with the defendant carrier, as to which plaintiffs have no vested property or other rights except as provided for and limited in said collective agreements, and the petition both fails to allege that they have, and shows on its face that they have not, brought themselves within such limitations so as to have any rights or remedies which may be enforced in, or over which, this Court has jurisdiction and this Court is therefore without jurisdiction of the subject matter.

6. To dismiss the action because the petition fails to state a cause of action within the jurisdiction of this Court in that the petition does not allege facts sufficient to establish that plaintiffs have exhausted their remedies, as lawfully provided and limited by, and as were duly created and became binding upon and available to the plaintiffs by virtue of, the respective constitutions, statutes, rules, rulings, decisions, schedules and contracts of the labor organizations, and of the various duly authorized officials, bodies, committees and agents thereof, which organizations were at all times referred to in the petition and are at the present time the duly accredited and acting exclusive bargaining agents respectively for the plaintiffs, in respect to the matters for which plaintiffs seek relief in their petition in this cause of action.

7. To dismiss the action for lack of jurisdiction, in that the petition fails to allege facts sufficient to establish that the requisite jurisdictional amount of $3,000.00, exclusive of interest and costs, is in controversy as required by law,

or any other ground sufficient to entitle this Court to assume jurisdiction of the subject matter.

[fol. 24] Dated September 5th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grimm, Cedar Rapids, Iowa, Attorneys for Defendants Order of Railway Conductors and Brotherhood of Railroad Trainmen—Address: 637 Omaha National Bank Building, Omaha, Nebraska.

Notice of Motion

To S. L. Winters and George P. Burger, Attorneys for Plaintiffs, and

To Wymer Dressler, Attorney for Defendant, Charles P. Megan, Trustee for the Chicago and Northwestern Railway Company:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office Building, Omaha, Nebraska, on the — day of ——, 1939.

Dated Sept. 5th, 1939.

W. C. Fraser, W. M. McFarland, J. M. Grimm, Cedar Rapids, Iowa, Attorneys for Defendants Order of Railway Conductors and Brotherhood of Railroad Trainmen—Address: 637 Omaha National Bank Building, Omaha, Nebraska.

[fol. 25] Service of the above notice and motion, and receipt of copy thereof, acknowledged this 5th day of September, 1939.

George Berger and S. L. Winters, Attorneys for Plaintiffs. Wymer Dressler, Robt. D. Neely, Hugo J. Lutz, Attorneys for Defendant Charles P. Megan, Trustee.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Order of Court Reserving Ruling on Motions to Dismiss—February 21, 1940

This cause comes on for hearing upon Motions of defendants George Kimball, Brotherhood of Railroad Train-

men and Order of Railway Conductors, to dismiss, the parties hereto appearing by their respective attorneys.

Thereupon, the Court reserves ruling on said Motions until parties to the suit stipulate the facts as to jurisdiction.

It Is Ordered, by the Court, that plaintiffs herein, individually make showing as to the matter of jurisdiction.

[fol. 26] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, BARNEY E. GASKILL—
Filed April 15, 1940

STATE OF NEBRASKA,
County of Douglas, ss:

Barney E. Gaskill, being first duly sworn, deposes and says; that he is fifty years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since October 1912; that he was promoted to conductor in December, 1917, and his seniority number is fifty-eight on the conductors [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect, and this agreement regarding interdivisional train runs, "When freight trainmen run over two or more divisions under more than one division superintendent the assignment of runs shall be made on basis of percentage of miles run on each division"; and this agreement was in effect over the entire Railroad which operates through many states.

That since May 1, 1930, the Chicago and Northwestern Railroad has operated trains over thirty-one miles of the Nebraska Division in violation of existing contracts, and at the present time, the Nebraska division trainmen are penalized to the extent of $28.17 daily due to the trainmen of the Sioux City Division performing the train service work over the Nebraska Division.

That Barney E. Gaskill has at all times asked for this work, and has appealed to the minor officials as well as to the President of the Railroad, Fred W. Sargent: that he

was notified by Mr. Sargent through the United States mails in July, 1935, "That the subject had been referred to Mr. Pangle and he had been requested to handle the entire subject in a way that would be fair to all." And the said Barney E. Gaskill was notified by M. E. Pangle, Assistant to the President, through the United States mail under date of May 22, 1934, August 2, 1935 and August 23, 1937, "That the Company and the Labor Organizations had entered into this agreement and he was unable to remedy the existing conditions and if we wished relief to take the subject matter up through the Labor Organizations."

[fol. 27] That suit was filed in February, 1938 in the District Court of Nebraska, asking for relief and a Declaratory Judgment, Chicago and Northwestern attorneys demurred on the ground that, "Remedies had not been exhausted under the Railway Labor Act," and November 2, 1938, Judge Rhine sustained the demurrer.

That on February 13, 1939, Barney E. Gaskill, with a court reporter, appeared at the office of T. S. McFarland, Secretary of the Railroad Adjustment Board, First Division, 220 South State Street, in Chicago, Illinois, to present a petition signed by forty-one trainmen of the Nebraska Division asking for the work they considered themselves entitled to; that Mr. McFarland refused to talk in the presence of the court reporter and after she had left the office, Mr. McFarland acted in an insulting manner and said, "I have written you four letters we will not handle that case, I will give you no receipt for the petition and exhibits, you can go back to Omaha and mail the petition and exhibits," but later in the day his Secretary gave affiant a receipt for petition and exhibits and accepted same; that in a short time petition and exhibits were returned with the notice, "That the Board had refused to docket the case."

That on February 13, 1939, Barney E. Gaskill talked of this subject matter with M. E. Pangle, Assistant to the President of the Railroad and Mr. Pangle stated, "That we trainmen would not be able to handle this case in the Courts as it would cost us $10,000.00."

That to the best of my knowledge and ability I have lost $3,000.00 and in addition expenses away from home due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Ne-

braska Division in violation of existing contracts; and further affiant sayeth not.

Barney E. Gaskill.

Subscribed and sworn to before me this 12 day of April, 1940. George P. Burger, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 28] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, ARTHUR E. SKOOG—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Arthur E. Skoog, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-eight years of age, a trainman employed on the Nebraska Division of the Chicago and Northwestern Railroad, and has been so employed since December 1911; that he was promoted to conductor in December, 1916 and to passenger conductor in 1935 and his seniority number is 57 on the conductors seniority [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Arthur E. Skoog.

Subscribed and sworn to before me this 3rd day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, EARL R. FARMER—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Earl R. Farmer, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is [fol. 29] a trainman employed by the Chicago and Northwestern Railroad and has so been employed since July, 1915; that he was promoted to conductor in December, 1920, and his seniority number is 68 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Earl R. Farmer.

Subscribed and sworn to before me this 11th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, CHARLES RUSSELL—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Charles Russell being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he

is forty-eight years of age, a trainman employed on the Nebraska Division of the Chicago and Northwestern Railroad, and has been so employed since April, 1916; that he was promoted to conductor in May, 1921 and his seniority number is 73 on the conductor's seniority [rooster] of the Nebraska Division.

[fol. 30] That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Charles Russell.

Subscribed and sworn to before me this 11th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, ARTHUR L. HOLTZMAN—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Arthur L. Holtzman, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-six years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since May 23, 1917; that he was promoted to conductor in December, 1922, and his seniority number is 80 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allow-[fol. 31] ing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Arthur L. Holtzman.

Subscribed and sworn to before me this 5th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, JOHN P. LEWIS—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

John P. Lewis, being first duly sworn, deposes and says, that he is a resident of Fremont, Nebraska; that he is fifty-three years of age, a trainman employed on the Nebraska division of the Chicago and Northwestern Railroad, and has been so employed since November 1912; that he was promoted to conductor in December 1917 and his seniority number is 59 on the conductors seniority [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska [fol. 32] Division in violation of existing contracts; and further affiant sayeth not.

John P. Lewis.

Subscribed and sworn to before me this 11th day of April, 1940. Habel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, MELVIN PERRINE—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Melvin Perrine, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is fifty years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since November 1917; that his seniority number is No. 1 on the Brakeman's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and

have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Melvin Perrine.

Subscribed and sworn to before me this 5th day of April, 1940. W. M. Stone, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF LOSS OF PLAINTIFF, GLEN A. MOORE—Filed April 15, 1940

STATE OF NEBRASKA,
County of Dodge, ss:

Glen A. Moore, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-six years of age, a trainman employed by the Chicago and Northwestern Railroad, and has so been employed since August, 1913; that he was promoted to conductor in November, 1922, and his seniority number is 82 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

Glen A. Moore.

Subscribed and sworn to before me this 5th day of April, 1940. Mabel A. Johnson, Notary Public. (Seal.)

[File endorsement omitted.]

In United States District Court

Affidavit of Loss of Plaintiff, Albert B. Benson—Filed April 24, 1940

State of Nebraska,
County of Dodge, ss:

Albert B. Benson, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he is forty-six years of age, a trainman employed on the Ne-
[fol. 34] braska Division of the Chicago and Northwestern Railroad and has been so employed since April, 1917; that he was promoted to conductor in May, 1922 and his seniority number is 79 on the conductor's seniority [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affant sayeth not.

Albert B. Benson.

Subscribed and sworn to before me this 15 day of April, 1940. Lloyd C. Blair, Notary Public. (Seal.)

[File endorsement omitted.]

In United States District Court

Affidavit of Loss of Plaintiff, George O. Gill—Filed April 24, 1940

State of Nebraska,
County of Dodge, ss:

George O. Gill, being first duly sworn, deposes and says; that he is a resident of Fremont, Nebraska; that he

is a trainman employed by the Chicago and Northwestern Railroad and has so been employed since June, 1913; that he was promoted to conductor in January, 1919 and his seniority number is 61 on the conductor's [rooster] of the Nebraska Division.

That when he entered the service of the Chicago and Northwestern Railroad, seniority rules were in effect and [fol. 35] an agreement regarding interdivisional train runs, which is in effect at the present time.

That since May 1, 1930 the Chicago and Northwestern Railroad has violated said rules and agreements by allowing Sioux City Division trainmen to perform train service work over the Nebraska Division.

That to the best of my knowledge and ability I have lost $3,000.00, exclusive of interest and costs, due to the fact that Sioux City Division trainmen are performing and have performed train service work over the Nebraska Division in violation of existing contracts; and further affiant sayeth not.

George O. Gill.

Subscribed and sworn to before me this 15th day of April, 1940. R. B. Scharman, Notary Public. (Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF CHARLES M. THOMSON, TRUSTEE OF PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, TO DISMISS—Filed May 24, 1940

Comes now Charles M. Thomson, Trustee of the Property of Chicago and North Western Railway Company, and successor to Charles P. Megan, formerly Trustee thereof, and moves the Court that this action be dismissed for want of jurisdiction for the reason that the affidavits and all of them filed by various plaintiffs as to the amount of their demands against the defendants are mere unsupported conclusions and not evidence sufficient to warrant

the Court in assuming jurisdiction of this cause. Said [fol. 36] affidavits should have been sufficiently specific as to amount to a bill of particulars, as heretofore moved by the defendant, but being mere conclusions they are wholly insufficient to warrant the Court in assuming jurisdiction.

Wymer Dressler, Robert D. Neely, H. J. Lutz, Counsel for Charles M. Thomson, Trustee.

Service of the foregoing motion and copy thereof is hereby acknowledged by plaintiffs this 23rd day of May, 1940.

S. L. Winters, George Burger, Counsel for Plaintiffs.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION OF DEFENDANTS, ORDER OF RAILWAY CONDUCTORS, BROTHERHOOD OF RAILROAD TRAINMEN AND GEORGE KIMBALL, TO STRIKE AFFIDAVITS OF PLAINTIFFS AND TO DISMISS THE PETITION—Filed June 3, 1940

The defendants, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball, move the Court as follows:

1. To strike the affidavits of Albert B. Benson, George O. Gill, Barney E. Gasgill, Arthur E. Skoog, Earl R. Farmer, Charles Russell, Arthur L. Holtzman, John P. Lewis, Melvin Perrine and Glen A. Moore from the files, for the following reasons;

[fol. 37] (a) That such affidavits were purportedly filed pursuant to the ruling of the Court on February 22, 1940, whereby the Court required counsel for the plaintiffs, to submit and file such showings as he could to establish that the jurisdictional amount was involved in this cause of action as to each plaintiff. The Court at that time ruled that the defendants would have an opportunity to meet any showings which plaintiffs might file, and that the

petition would be dismissed as to each of the plaintiffs who were unable to satisfy the Court that the jurisdictional amount was involved as to each such plaintiff. Said affidavits were filed with the Clerk of the Court in the month of April, 1940, without any notice thereof to these defendants and no copies thereof were served on these defendants or their counsel, and these defendants had no knowledge of such filing until their counsel called the plaintiffs' counsel on May 13, 1940 to ascertain whether plaintiffs intended to make any effort to meet the Court's requirements. That the failure of plaintiffs' counsel to notify defendants' counsel thereof or to serve copies of such affidavits on defendants' counsel is in violation of Rule 5 of the Rules of Civil Procedure now in force and effect.

(b) That in substance the said affidavits merely stated, (1) the date of employment and the date of attaining present seniority rank and number as to each such affiant (2) that the seniority rules created by agreement have been violated, since May 1, 1930, and (3) that to the best of such affiant's knowledge he has thereby lost $3,000, exclusive of interest and costs. That such affidavits contain no material statements of fact whatever, and as to the jurisdictional question are the unsupported conclusions of the plaintiffs, which add nothing whatever to the same conclusions as originally pleaded by all plaintiffs in paragraph 13 of their petition. That even if $3,000 had been lost by each such plaintiff since May 1, 1930, all that part thereof except such as had been lost in the five year period immediately preceding May 6, 1939 would be barred by the statute of limitations. Attached to, marked Exhibits "A" and "B" respectively, and by reference hereby made a part hereof, are counter-affidavits of (A) F. H. Nemitz, an official of the defendant Order of Railway Conductors, and (B) O. G. Jones, an official of the defendant [fol. 38] Brotherhood of Railway Trainmen, both of whom are familiar with the railroad operations involved, which negative the said conclusions of the affidavits of said plaintiffs.

2. The motions of said defendants to dismiss plaintiffs' petition are hereby renewed, for the reasons as therein stated, especially for the reason contained in paragraph 7 of the said motion of the defendants Order of Railway

Conductors and Brotherhood of Railroad Trainmen to dismiss, which has heretofore been submitted to the Court, and further because the plaintiffs have failed to make any showing of the jurisdictional amount being involved as to any of said plaintiffs, as required by order of this Court.

Dated June 3rd, 1940.

W. C. Fraser, W. M. McFarland, J. M. Grimm, (Cedar Rapids, Ia.) Attorneys for Defendants, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball.

NOTICE OF MOTION

To S. L. Winters and George P. Burger, Attorneys for Plaintiffs, and To Wymer Dressler, Attorney for Defendant, Charles P. Megan, Trustee for Chicago and Northwestern Railway Company:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Post Office Building, Omaha, Nebraska, on the day of , 1940, at o'clock, M.

Dated June 3rd, 1940.

W. C. Fraser, W. M. McFarland, J. M. Grimm, (Cedar Rapids, Ia.) Attorneys for Defendants, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball.

[fol. 39] Service of the above notice and motion and receipt of copies thereof acknowledged this 3rd day of June, 1940.

George Burger, S. L. Winters, Attorneys for Plaintiffs. Wymer Dressler, Dressler & Neely, Attorney for Defendant, Charles P. Megan, Trustee for Chicago and Northwestern Railway Company.

EXHIBIT "A" TO MOTION

(Affidavit of F. H. Nemitz.)

STATE OF IOWA,
Linn County, ss.:

I, F. H. Memitz, being first duly sworn, depose and say that I am at present living at Cedar Rapids, Iowa. I am

fifty-nine (59) years of age. I am a director and vice president of the defendant Order of Railway Conductors of America, and have been such director and vice president continuously since September 1, 1920.

I began railroading about June, 1903, as a freight brakeman, and in September, 1907 was promoted to freight conductor. I continued to act as freight conductor on the Southern Pacific lines until I was elected general chairman of the craft of conductors on said Southern Pacific lines, which was on January 1, 1918. I continued as general chairman of the craft of conductors on the Southern Pacific lines until I became director and vice president of the Order of Railway Conductors of America.

As general chairman of the conductors for the Southern Pacific lines, I had approximately ten thousand (10,000) miles of railroad under my charge, and fifteen hundred (1500) members of the Order of Railway Conductors, besides many other members of the craft who were not members of the Order of Railway Conductors. The general committee consisted of sixteen (16) members.

[fol. 40] As said general chairman during said period of time on said ten thousand (10,000) miles of railroad, all kinds and characters of grievances and questions in reference to the alleged rights of conductors among each other and with the railroad company arose, and I became generally familiar with railroad operations and with the problems that usually arise and have arisen between groups of conductors and between conductors and the employing railroad.

As a member of the Board of Directors and vice president of the Order of Railway Conductors of America, I have had further experience in reference to difficulties such as are set forth in this case of Gaskill, et als. vs. Megan, et als. I have been in the field on various occasions having hearings and making general investigations in reference to these difficulties which arise between groups of conductors and between conductors and the railroads. I have had the same experience in my office as a director and vice president.

I am familiar with the Chicago & Northwestern Railway Company operations and the runs involved for Chicago & Northwestern train crews operating any Chicago & Northwestern runs over any trackage between Omaha, Nebraska

and Sioux City, Iowa for the five year period preceding May 6, 1939, and I am familiar with the respective seniority rights of Chicago & Northwestern employees created by collective bargaining agreements and the rules and regulations made pursuant thereto; that any such railroad runs as aforesaid which were not handled by crews from the Nebraska Division of the Chicago & Northwestern employees as to which there could be any question as to the said Nebraska Division of Chicago & Northwestern employees having any seniority rights by virtue of any collective bargaining agreements or rules and regulations made pursuant thereto would necessarily, by virtue of the physical ownership and operation of the trackage and lines involved, be confined to that approximately seven and one-half (7½) or eight (8) mile stretch of track between Blair and California Junction; that during said five year period it was physically impossible for any one of the ten (10) plaintiffs who filed affidavits concerning the existence of the federal court jurisdictional amount being involved in said cause of action, to individually have been entitled by seniority [fol. 41] to such runs and been denied enough work over said seven and one-half (7½) to eight (8) miles of track in order to have lost Three Thousand Dollars ($3,000) exclusive of interest and costs.

Shortly after May 10, 1939 I was asked by J. M. Grimm, of the firm of Grimm, Elliott, Shuttleworth & Ingersoll, in Cedar Rapids, Iowa, general counsel of the Order of Railway Conductors of America, to make a thorough examination and investigation of the files and facts in the case. I took all the office files and made a thorough study of the entire record, and I am thoroughly familiar with the same. I have read the petition in this case and I am familiar with the claims of the plaintiffs and each of them.

Some of the claims of the plaintiffs as set forth in this case have been pending in one form or another for a number of years. There have been involved in the controversy two railroads, the Chicago & Northwestern Railway Company (hereinafter for brevity called C. & N. W. Ry. Co.), and the Chicago, St. Paul, Minneapolis & Omaha Railroad (hereinafter for brevity called C. St. P. M. & O. Railroad). The C. & N. W. Ry. Co. owns and operates a railroad which, so far as this case is concerned, runs westward from Chicago, Illinois, through Missouri Valley, California Junction, Blair

and Fremont, Nebraska. The C. St. P. M. & O. Railroad owns and operates a railroad, among other places, from Omaha, Nebraska, through Blair, Nebraska, and on the west side of the Missouri River to a bridge over the Missouri River near Sioux City, Iowa, to Sioux City, Iowa. In other words, the C. & N. W. Ry. Co. and the C. St. P. M. & O. Railroad cross each other at Blair, Nebraska.

The C. & N. W. Ry. Co. owns a controlling interest, but not all, of both the preferred and common stock of the C. St. P. M. & O. Railroad, and has so owned said stock for an indefinite period of time, but the two railroads are entirely separate and distinct in their management and operation, and have been two separate and distinct railroads during all the time involved in this suit.

The term "seniority", as used in this and similar cases, and as applied to railroad operation, means age in service in a particular craft, and as applied to the craft of con- [fol. 42] ductors it means the date when a conductor was promoted or began service as a conductor on the C. & N. W. Ry. Co., or was promoted or began service as a conductor on the C. St. P. M. & O. Railroad.

Seniority is based upon and enforced entirely by collective bargaining contracts made between craft unions and railway companies, commonly known as schedules. That is to say, seniority on the C. & N. W. Ry. Co. for a conductor is based on a collective bargaining contract or schedule made by the Order of Railway Conductors with the management of the C. & N. W. Ry Co., and pertains only to rights and remedies on the property operated by the C. & N. W. Ry. Co.

Seniority on the C. St. P. M. & O. Railroad is based upon and enforced by collective bargaining contracts or agreements, sometimes called schedules, made by the Order of Railway Conductors as a collective bargaining agency for the craft of conductors, and the management of the C. St. P. M. & O. Railroad, and pertains only to rights of the craft of conductors on the C. St. P. M. & O. Railroad.

A conductor who has seniority on the C. & N. W. Ry. Co. has no seniority rights whatever on the C. St. P. M. & O. Railroad, and a conductor who has seniority rights on the C. St. P. M. & O. Railroad does not have any rights whatever on the C. & N. W. Ry. Co.

This seniority is confined to what is known as seniority divisions, which seniority division is usually a portion of

the track of the railway company under the supervision of one superintendent, although not always, but the seniority is always confined to a definite portion of the railway and a seniority list is kept, maintained and posted of the men who have seniority as conductors on that seniority division. This applies to all railroads having schedules or seniority contracts. The name of a conductor appears, therefore, only on one railway seniority list, and not on the lists of two railways.

What has hereinbefore been said in reference to seniority of men of the craft of conductors is equally true of the craft of brakemen, most of whom belong to the Brotherhood of Railroad Trainmen. The plaintiffs in this case who belong to the craft of conductors are many of them [fol. 43] members of the Order of Railway Conductors of America, and hold seniority in what is commonly called the Nebraska or Eastern Division of the C. & N. W. Ry. Co., and the same is true with brakemen so far as holding seniority is concerned.

This controversy constitutes a claim by members of this Nebraska or Eastern Division of the craft of conductors and of the craft of brakemen against George Kimball, who holds seniority on the Sioux City Division of the C&NW Ry. Co. as conductor and also as brakeman, the said George Kimball being made a defendant as the representative of said Division, or, as the plaintiffs state in Paragraph 8 of their petition, "Plaintiffs further state that the controversy arises over the division of seniority rights between the Nebraska Division, to which plaintiffs belong, and the Sioux City Division, to which the defendant George Kimball belongs, over the Northwestern Railroad from Omaha, Nebraska to Sioux City, Iowa."

Affiant further states that as freight is transported from Sioux City, Iowa to Omaha, Nebraska, the same passes over the C&NW Ry. lines from Sioux City to California Junction, and from California Junction to Blair, over the C&NW tracks, and from Blair to Omaha on the CStPM&O tracks; that in transporting freight from Omaha to Sioux City it passes over the railread from Omaha to Blair on the rails of the CStPM&O, and from Blair to California Junction on the C&NW Ry. tracks, and from California Junction to Sioux City on the tracks of the C&NW Ry. This has been the case during the six years

and more last past and is the case now. The plaintiffs, as employees of the C&NW Ry. Co., have no seniority rights whatever over the tracks of the CStPM&O between Blair and Omaha.

For six years and more freight trains have been operated between Omaha, Nebraska over the CStPM&O to Blair, Nebraska, from and over the tracks of the C&NW to California Junction, and on to Sioux City, and vice versa, because of the unfavorable grades, curves and distances on the CStPM&O between Blair and Sioux City. For six years and more the employees of the CStPM&O have shared in the operation of trains from Omaha, Nebraska to [fol. 44] Sioux City, Iowa through Blair and California Junction. This sharing is based on a ratio according to the number of miles that are run on each of the two railroads between Omaha and Sioux City via Blair and California Junction.

Prior to August 1, 1926 these trains were operated from Sioux City to Missouri Valley, to Council Bluffs and over the Illinois Central Railroad to Omaha. A part of this service was rendered by the employees of the CStPM&O.

On August 1, 1926 the employees of the CStPM&O ceased rendering any service on that routing. The present system of routing and operation went into effect May 1, 1930, and has continued so ever since.

Prior to August 14, 1930 a controversy arose in which the CStPM&O craft of conductor- and craft of brakemen claimed the right to man some of the trains between Omaha and Sioux City. A hearing was held about August 14, 1930, and on August 19, 1930 the chief executives of the two labor organizations, to-wit, the Order of Railway Conductors of America and the Brotherhood of Railroad Trainmen, rendered a decision, by which decision it was held that this service from Omaha to Sioux City via Blair and California Junction constituted inter-railroad service, and that the conductors and brakemen on each of the two railroads should be given a proportionate share of the work in that service. The said service was then apportioned between the employees of the CStPM&O and the employees of the C&NW Ry., and the said service has been so apportioned and manned ever since. In said apportionment, the miles of track from Omaha to Blair are credited to the men on the CStPM&O, and the miles of

track from Blair, Nebraska to Sioux City, Iowa to the men on the C&NW Ry.

That decision, signed by Mr. Curtis, the then president of the Order of Railway Conductors, and Mr. Whitney, the then president of the Brotherhood of Railroad Trainmen, in effect decided that the employees of the C&NW Ry. Co., regardless of all past history, had no seniority rights of any kind or character on the CStPM&O tracks between Blair and Omaha, Nebraska. This decision was never ap- [fol. 45] pealed from by the Order of Railway Conductors or the members of the craft.

The members of the Brotherhood of Railroad Trainmen filed an appeal, and a final decision was procured from the Board of Directors of the Brotherhood of Railroad Trainmen, and afterwards from the Board of Appeals of the Brotherhood of Railroad Trainmen, both of which sustained the rulings of Mr. Whitney, the then president of the Brotherhood of Railroad Trainmen, thus sustaining the said ruling of the chief executives, the president of the Order of Railway Conductors, and the president of the Brotherhood of Railroad Trainmen.

This decision of the executives became binding and effective as to all conductors and [brakeman] on the C&NW Ry., and the only trackage involved in the present suit is that between Blair, Nebraska and California Junction in Iowa, which constitutes trackage of approximately seven and one-half (7½) to eight (8) miles in length.

The rates of pay for conductors during the time involved up to October 1, 1937 was six and fifty-six hundredths cents (6.56¢) per mile. On October 1, 1937 forty-four hundredths cents (0.44¢) per mile was added as compensation, so that from October 1, 1937 to the present time the compensation to conductors over said mileage was seven cents (7¢) per mile. Consequently, if any one of the conductors plaintiffs in this case had operated a train over said seven and one-half (7½) to eight (8) miles from Blair to California Junction every day for the last six years and received therefor the maximum of seven cents (7¢) per mile, his total income from that source would be Twelve Hundred Twenty-six Dollars Forty Cents ($1,226.40), and had a brakeman run over said seven and one-half (7½) to eight (8) miles every day during the six years last past, his total income from that service would be Nine Hundred Seventy-nine Dollars Thirty-seven cents ($979.37),

the brakeman's rate being five and fifteen hundredths cents (5.15¢) per mile for the period May 6, 1934 to October 1, 1937, and five and fifty-nine hundredths cents (5.59¢) per mile from October 1, 1937 to date.

It follows that no one of the plaintiffs in this case can possibly have a claim against Kimball or any other mem- [fol. 46] ber of the Sioux City Division, or the Sioux City Division as a whole, for more than Twelve Hundred Twenty-six Dollars Forty Cents ($1,226.40), and no brakeman can possibly have a claim against Kimball or any other Sioux City Division man, or all the brakemen of the Sioux City Division, of more than Nine Hundred Seventy Nine Dollars Thirty-seven Cents ($979.37).

Affiant does not hereby intend to state that any amount is due any one of these plaintiffs, but only states that if any amount is due any one of said plaintiffs, it cannot equal Three Thousand Dollars ($3,000) exclusive of interest and costs.

F. H. Nemitz.

Subscribed and sworn to before me this 21st day of May, A. D., 1940. S. M. Hoffner, Notary Public in and for Linn County, Iowa. (Seal.)

EXHIBIT "B" TO MOTION

(Affidavit of O. G. Jones)

STATE OF ILLINOIS,
County of Cook, ss:

I, O. G. Jones, being first duly sworn, depose and say that I live at Onawa, Iowa, but my place of business is at 53 West Jackson Blvd., Chicago, Illinois, where I am general chairman on the Chicago & Northwestern Railway System for the Brotherhood of Railroad Trainmen.

I began railroading in September, 1900 as a brakeman on the Sioux City Division of the Chicago & North Western Railway Company and its branches. I was promoted in August, 1906 to a conductor, and acted as brakeman and conductor for about five years on the Sioux City Division of the Chicago & North Western Railway Company (hereinafter, for brevity, called C&NW Railway Co.).

After 1911 I became a regular assigned conductor in freight and passenger service on the Sioux City Division of the C&NW Railway Co., until August 11, 1939, at which [fol. 47] time I was elected General Chairman for the Brotherhood of Railroad Trainmen (hereinafter, for brevity, called the B. of R. T.) on the C&NW Railway. I retained my seniority as brakeman and conductor on the Sioux City Division of the C&NW Railway Co.

I was local chairman for the B. of R. T. on the said Sioux City Division from 1914 to 1939, when I was elected General Chairman. I was secretary of the General Committee of the B. of R. T. on the C&NW Railway from 1926 to 1939.

I am thoroughly familiar with the said Sioux City Division of the C&NW Railway Co., as I have worked there in various capacities as above stated for many years. I am also more or less familiar with what is sometimes called the Eastern Division, which in reality, is now the Nebraska Division of the C&NW Railway Company, which includes the trackage from Missouri Valley, Iowa to Long Pine, Nebraska, through California Junction and Blair, from Norfolk, Nebraska to Wood, South Dakota, from North Omaha, Nebraska to Fremont, Nebraska, from Fremont, Nebraska to Hastings, Nebraska from Linwood, Nebraska, to Superior, Nebraska, and from Fremont, Nebraska to Lincoln, Nebraska.

I have read the petition filed by the plaintiffs in the suit entitled Barney E. Gaskill, et al., Plaintiffs, vs. Charles P. Megan, Trustee for the Chicago & North Western Railway Company, et al., in the Federal Court in Omaha, Nebraska, and by reason of my service on the C&NW Railway Co. and the Sioux City Division thereof for the years as above set forth, and by reason of being local chairman and secretary of the General Committee for the C&NW Railway System, I became thoroughly familiar with the various claims and disputes and controversies which arose between the Nebraska Division, formerly known as the Eastern Division, and the Sioux City Division of the C&NW Railway Co., particularly as these controversies arose between the brakemen of the two divisions. In the capacities above stated I became thoroughly familiar with all the various trains that were operated on the Sioux City Division and the manner in which said trains were routed from time to time. The grades and

[fol. 48] curves and distances from Omaha to Sioux City by way of Blair and the west side of the Missouri River are very unfavorable as compared with the grades and curves and distances from Omaha to Sioux City by way of Blair, California Junction and Sioux City, and vice versa.

For a period of years from about 1925 to 1930 business between Omaha and Sioux City was routed from North Omaha to Council Bluffs, over the Illinois Central bridge, from Council Bluffs to Missouri Valley, and from Missouri Valley to Sioux City, and vice versa. About 1930 this operation was changed so that the business was run from North Omaha to Blair, to California Junction, to Sioux City, and vice versa.

During all of this time there were in existence the two separate and distinct railroads, the one the C&NW Railway Co., and the other the Chicago, St. Paul, Minneapolis & Omaha (hereinafter, for brevity, called the CStPM&O). While the C&NW Railway has, during the years above specified, owned some of the stock of the CStPM&O the two railroads were operated as entirely distinct and separate railroads with separate management and separate finances. During said years each railroad had its own schedules with the union employees.

The miles of trackage between Blair and California Junction are 7.5, the miles of trackage from California Junction to Missouri Valley are 5.9.

The term "seniority" as used in this and similar cases, and as applied to railroad operation, means age in service in a particular craft, and as applied to the craft of brakeman it means the date when a brakeman began service as a brakeman on the C&NW or began service on the CStPM&O Railroad; and as applied to a conductor it means the date when he was promoted or began service on the C&NW Railway Co. as a conductor, or was promoted or began service as a conductor on the CStPM&O. No conductor and no brakeman has any seniority on more than one railroad at a time.

Seniority or seniority rights, as they are sometimes called, are limited absolutely to a seniority division, which is a definitely defined portion of a railroad. Seniority is [fol. 49] based upon and enforced entirely by collective bargaining contracts or schedules made between craft unions and railway companies. That is to say, seniority on the C&NW Railway Co. for a brakeman is based on a collective

bargaining contract or schedule made between the B. of R. T. and the management of the C&NW Railway Co., and pertains only to rights and remedies on the property operated by the C&NW.

Seniority on the CStPM&O is based upon and enforced by collective bargaining contracts or agreements, sometimes called schedules, made between the B. of R. T., as a collective bargaining agency for the craft of brakemen, and the management of the CStPM&O, and pertains only to rights of the brakemen on the CStPM&O. The same is true in reference to the craft of conductors on each of said railroads.

The name of a brakeman appears on only one railway seniority list at a time, and not on the lists of two railroads. The name of a conductor appears only on one railway seniority list, and not on the seniority list of two railroads.

Some of the plaintiffs in this case are members of the B. of R. T., and some of the plaintiffs in this case are members of the Order of Railway Conductors, and some of the plaintiffs do not belong to either organization but are working as members of either the craft of brakemen or the craft of conductors.

During all of the times involved in this litigation the C&NW Railway Co. owned and operated a line of railway extending, among other places, west from Chicago through Missouri Valley, California Junction, Blair and Fremont. At the same time the CStPM&O owned a line of railway running, among other places, from Omaha, Nebraska through Blair, along the west side of the Missouri River to a bridge across the Missouri River near Sioux City, and to Sioux City and on northeast. Thus these two railroads crossed each other at Blair, Nebraska.

For many years controversies of various kinds have existed between the brakemen and conductors on the Eastern, or Nebraska Division of the C&NW and the brakemen [fol. 50] and conductors on the Sioux City Division of the C&NW, and the brakemen and conductors on the CStPM&O from Omaha to Sioux City. For a number of years the Nebraska Division brakemen and conductors have been claiming certain rights on that portion of the CStPM&O from North Omaha to Blair, Nebraska.

The controversy in this case constitutes a claim by members of the Nebraska Division of the craft of brake-

men and the craft of conductors, against George Kimball of Sioux City, Iowa, who holds seniority in the Sioux City Division of the C&NW Railway Co. as a brakeman and also as a conductor, the said George Kimball being made a defendant as the representative of said division, or, as the plaintiffs state in Paragraph 8 of their petition, "Plaintiffs further state that the controversy arises over the division of seniority rights between the Nebraska Division, to which plaintiffs belong, and the Sioux City Division, to which the defendant George Kimball belongs over the Northwestern Railroad from Omaha, Nebraska to Sioux City, Iowa."

The plaintiffs, as employees of the C&NW Railway Co., have no seniority rights whatever over the tracks of the CStPM&O Railroad between Blair and Omaha.

For six years and more freight trains have been operated between Omaha, Nebraska over the CStPM&O Railroad to Blair, Nebraska, and from Blair, Nebraska over the tracks of the C&NW to California Junction, and on to Sioux City, and vice versa. A majority of the business which normally would be handled from Omaha through Blair and Sioux City over the CStPM&O is now, and has been handled fro six years or more, over the CStPM&O from Omaha to Blair, and over the C&NW from Blair to California Junction, from California Junction to Sioux City, and vice versa.

For six years and more the employees of the CStPM&O have shared in the operation of trains from Omaha, Nebraska to Sioux City, Iowa through Blair and California Junction. This sharing of trains is based on a ratio according to the number of miles that are run on each of the two railroads between Omaha and Sioux City via Blair and California Junction.

[fol. 51] Prior to August 1, 1926 these trains were operated from Sioux City to Missouri Valley to Council Bluffs and over the Illinois Central Railroad to Omaha. A part of this service was rendered by the employees of the CStPM&O.

On or about August 1, 1926 the employees of the CStPM&O ceased rendering any service on that routing. The present system of routing and operation went into effect May 1, 1930 and has continued so ever since.

Prior to August 14, 1930 a controversy arose in which the CStPM&O craft of brakemen and craft of conductors

claimed the right to man some of the trains between Omaha and Sioux City through Blair and California Junction. A hearing was held about August 14, 1930, and on August 19, 1930 the chief executives of the two labor organizations, to-wit, the B. of R. T. and the Order of Railway Conductors, rendered a decision, by which decision it was held that this service from Omaha to Sioux City via Blair and California Junction constituted interrailroad service, and that the brakemen and conductors on each of the two railroads should be given a proportionate share of the work in that service, that said service was then apportioned between the employees of the CStPM&O and the employees of the C&NW Railway Co., and the said service has been so apportioned and manned ever since.

In said apportionment the miles of track from Omaha to Blair owned by the CStPM&O are credited to the men on the CStPM&O, and the miles of track from Blair, Nebraska to Sioux City, Iowa to the men on the C&NW. In this apportionment there are also 1.7 miles of trackage between Dace and 22nd Streets in Sioux City, Iowa accredited to the CStPM&O men.

That decision, signed by Mr. Whitney, the then and now president of the B. of R. T., and Mr. Curtis, the then president of the Order of Railway Conductors, in effect definitely decided that the employees of the C&NW Railway, regardless of all past history, had no seniority rights of any kind or character on the CStPM&O tracks between Blair and Omaha, Nebraska. This decision was never appealed from by the Order of Railway Conductors or the members of the craft of conductors on the Nebraska Divi- [fol. 52] sion. The members of the B. of R. T. filed an appeal, and a final decision was procured from the Board of Directors of the B. of R. T., and afterwards from the Board of Appeals of the B. of R. T., both of which boards sustained the rulings of Mr. Whitney, the then and now president of the B. of R. T., thus sustaining the said ruling of the chief executives, the president of the B. of R. T. and the president of the Order of Railway Conductors.

This decision of the executives, as above stated, became binding and effective as to all brakemen and conductors on the C&NW, and the only trackage involved in the present suit as brought pertains to that trackage between Blair, Nebraska and California Junction in Iowa, which constitutes trackage of approximately 7.5 miles in length.

The rates of pay for conductors during the times involved up to October 1, 1937 was 6.56 cents per mile. On October 1, 1937 .44 cents per mile was added as compensation, so that from October 1, 1937 to the present time the compensation to conductors over said mileage was 7 cents per mile.

Consequently, if any one of the conductors plaintiffs in this case had operated a train over said 7.5 miles from Blair to California Junction every day for the last six years, and received therefor the maximum of 7 cents per mile, his total income from that source would be $1,149.75, and if he made a round trip over said 7.5 miles every day for six years, the maximum he could possibly make would be $2,299.50; and had a brakeman run over said 7.5 miles every day during the six years last past, his total income from that service would be $918.16, the brakeman's rate being 5.15 cents per mile for the period May 6, 1934 to October 1, 1937, and 5.59 cents per mile from October 1, 1937 to date, and if he made a round trip over said 7.5 miles every day for six years, the maximum he could possibly make would be $1,836.32.

It follows that no one of the plaintiffs conductors in this case can possibly have a claim against Kimball or any other members of the Sioux City Division, or the Sioux City Division as a whole, or any one else, including the C&NW Railway Co. or its trustee, for more than $2,299.50, [fol. 53] and no brakeman can possibly have a claim against Kimball or any other Sioux City Division man, or all the brakemen of the Sioux City Division, or any one else on the Sioux City Division, or the C&NW Railway Co., or its trustee, of more than $1,836.32. These maximums show what the earnings would be if the maximum rate were given for the entire time, and if the individual made not only a trip but a round trip over this area every day for the six years involved.

When it is considered that there are approximately 40 plaintiffs and that in maximum operations there would be not more than four trains a day each way, and a part of the time only three trains a day, having one conductor and two brakemen, over this territory, it is apparent and conclusive that no one of the plaintiffs in this case can possibly have a claim against any one or the railroad company, or its trustee, for the sum of $3,000 exclusive of

interest and costs, upon the claims made by the plaintiffs in this suit.

Affiant is informed and believes that out of the 40 odd plaintiffs, 10 belong to the Order of Railway Conductors and 18 belong to the Brotherhood of Railroad Trainmen.

Those of us who are familiar with the situation know that only a small number of these plaintiffs could work between Blair and California Junction at one time, and consequently their said claims would be proportionately decreased. Moreover, it is a matter of observation and experience that men do not work steadily every day for a period of six years, but take lay-offs and vacations and are out of work for periods of time. This consideration would also very materially decrease the claims of the plaintiffs.

For the six years last past and more the said Nebraska Division has operated trains between Missouri Valley, Fremont, and beyond west, and between Missouri Valley and Omaha over the Sioux City Division between California Junction and Missouri Valley, a distance of 5.9 miles. During practically all of this period of time the said Nebraska Division has operated three regular trains in either direction six days per week.

[fol. 54] If there is any liability on the part of the Sioux City Division to the Nebraska Division for the use of the trackage between Blair and California Junction, then by the same token there is a similar liability of the Nebraska Division to the Sioux City Division for the use of said trackage between California Junction and Missouri Valley.

Using this to offset the mileage the Sioux City Division operated during the same period over the Nebraska Division between California Junction and Blair, there would be a relatively small amount of mileage or time due the Nebraska Division.

Affiant does not hereby intend to state that any amount is due any one of these plaintiffs, but only states that if any amount is due any one of said plaintiffs, it cannot equal $3,000 exclusive of interests and costs.

O. G. Jones.

Subscribed and sworn to before me this 29th day of May, A. D., 1940. John Mueller, Notary Public in and for Cook County, Illinois. (Seal.)

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF G. F. STEPHENS IN SUPPORT OF MOTION TO DISMISS—Filed June 4, 1940

STATE OF ILLINOIS,
Cook County, ss:

I, G. F. Stephens, do solemnly swear that I am Director of Personnel of Chicago and North Western Railway Company, now being operated under Charles M. Thomson, Trustee, and have been Assistant Director of Personnel [fol. 55] for a number of years last past; that I am thoroughly familiar with all phases of the controversy involved in this suit; tha I have read the affidavit of Mr. F. H. Nemitz filed in this cause on behalf of the Railroad Brotherhoods, defendants herein; that the facts stated in said affidavit on Pages 3, 4, 5, 6, 7, 8, 9 and 10 thereof are true of my own knowledge.

I further state that based upon the history of said controversy and the facts stated in the affidavit of Mr. Nemitz, it would be impossible for any of the plaintiffs in this suit to have earned within four or five years of the commencement of the suit as much as $3,000.00 each on account of runs denied to any of plaintiffs who are members of the Nebraska Division of Chicago and North Western Railway Company over the Nebraska Division thereof, which runs may have been assigned to members of the Sioux City Division of Chicago and North Western Railway Company, over the territory between Blair, Nebraska, and California Junction, Iowa, and that in my opinion the amounts of such deprived earnings, if any, could not exceed the amounts stated in the first paragraph of Page 11 of the affidavit of Mr. Nemitz.

I further say, therefore, based upon my knowledge of the controversy and my knowledge of the facts involved, that no plaintiff in this suit has any legitimate claim to as much as $3,000.00, even if his contentions should be upheld as to the division of runs accruing to him within five years

before the suit was filed, regardless of whether such claims be litigated in the Federal Court or the State Courts.

G. F. Stephens.

Subscribed and sworn to before me this 29th day of May, 1940. Margaret C. Carmody, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 56] IN THE DISTRICT COURT OF THE UNITED STATES

No. 42

Civil Action

BARNEY E. GASKILL, et al., Plaintiffs,

vs.

CHARLES P. MEGAN, Trustee for the Chicago and Northwestern Railway Company, a corporation, et al., Defendants

FINDINGS OF THE COURT AND JUDGMENT DISMISSING CASE—September 21, 1940

This matter came on to be heard the 7th day of September, 1940, upon the portions of the various motions of the various defendants to dismiss the petition in this case and to dismiss the above-entitled cause for want of jurisdiction on the ground that the petition fails to allege facts sufficient to establish that the requisite jurisdictional amount of $3,000, exclusive of interest and costs, is in controversy as required by law, and for the reason that, the jurisdiction of the Court having been properly challenged and the Court having required each plaintiff to establish that the requisite jurisdictional amount is involved as to his demand, the affidavits as filed by certain of said plaintiffs, as to the amount of their respective demands involved herein against the defendants, are unsupported conclusions which are insufficient to establish jurisdiction in the Court when so properly challenged and because said conclusions are shown to be untrue by defendants' evidence submitted

dehors the petition and that the plaintiffs' evidence is insufficient to enable the Court to assume jurisdiction in this case; and upon the motions of certain of said defendants to strike the said affidavits of plaintiffs as filed.

The Court having heretofore announced that in his opinion the various claims of the plaintiffs were separable and that the case was not such a class action so as, within Rule 23 of the Rules of Civil Procedure or otherwise, to permit the aggregating of the claims of all plaintiffs together in order to give the jurisdictional amount required by law, and the Court having orally, before passing on any of the other grounds for dismissal raised by the defendants' motions to dismiss, ruled that each plaintiff would be required, by whatever means or evidence they saw fit, [fol. 57] to show that each such plaintiff's claim involved the requisite jurisdictional amount, and that the petition would be dismissed as to each plaintiff whom the Court would find had failed to make such a satisfactory showing; and ten of the plaintiffs having each individually filed an affidavit in which the existence of the requisite jurisdictional amount as to such respective affiant was stated substantially as alleged originally in Paragraph 13 of the petition, but the plain iffs, having continued to contend as they did throughout all these proceedings that this case was a class action under Rule 23 of said Rules of Civil Procedure and that the rights of the various plaintiffs herein, and of the class represented by the defendant George Kimball, could be determined only in one proceeding in which all were made parties; and the Court having offered to allow all the plaintiffs to produce additional evidence to show that the jurisdictional amount was in controversy as to each individual plaintiff, but the plaintiffs in open Court having elected to stand on the proposition as stated by them "that this is a class action within Rule 23 above mentioned, and that the rights of the plaintiffs are so interlocked and interwoven that the rights of one cannot be determined without the others being parties thereto, and therefore, that the aggregate amounts involved include not only what has already been earned by each party, but what they might earn in the future should be considered in determining the jurisdictional amount."

The Court in order to clarify the issues, finds as follows:

(1) That the defendants have properly challenged the existence of the requisite jurisdictional amount so as to

raise the question of the Court's jurisdiction to hear and determine this case;

(2) That the claims of the plaintiffs are separable and that this action is not such a class action so as, under Rule 23 of said Rules of Civil Procedure, or otherwise, to allow or permit the aggregating of the amounts of the claims of all plaintiffs in determining the existence of the requisite jurisdictional amount;

[fol. 58] (3) That no plaintiff has made a sufficient showing that the requisite jurisdictional amount is involved as to his claim; and

(4) That the evidence submitted by the defendants dehors the petition together with the allegations of the petition establish that the amount in controversy as to any one plaintiff does not amount to as much as $3,000, exclusive of interest and costs.

The Court concludes as a matter of law, therefore, that the Court is without jurisdiction to hear and determine the case, and that the petition should be dismissed as to all plaintiffs.

Wherefore, It Is Ordered, Adjudged and Decreed that the above-entitled cause, for the reasons above set forth, should be, and is hereby, dismissed as to all plaintiffs against all defendants, and that the defendants have and recover judgment respectively for their costs herein expended.

To all of which the various plaintiffs except.

Dated at Omaha, Nebraska, this 21st day of September, 1940.

By the Court, J. A. Donohoe, United States District Judge for the District of Nebraska, Omaha, Division.

OK as to form. Wymer Dressler, R. D. Neely, Attys. for C&NW Ry. Co.

J. C. Grimm, W. C. Fraser, W. M. McFarland, Attys. for George Kimball, O. R. C. and B. R. T.

O. K. S. L. Winters, Geo. Burger, Attys. for Plaintiffs.

[File endorsement omitted.]

[fol. 59] Cost Bond on appeal for $250.00, filed Oct. 21, 1940, omitted in printing.

[fol. 60] Subscribed in my presence and sworn to before me this 19th day of October, 1940. George P. Burger, Notary Public. (Seal.)

Commission expires on the 6th day of March, 1945.

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed Oct. 21, 1940

Notice is hereby given that Barney E. Gaskill, et al., Plaintiffs, hereby appeal to the Circuit Court of Appeals for the Eighth (8th) Circuit, from the Findings of the Court, and Judgment Dismissing Case by the District Court of the United States, Honorable J. A. Donohoe, District Judge, dated September 21, 1940.

Dated at Omaha, Nebraska, this 14th day of October, 1940.

Barney E. Gaskill, et al., Plaintiffs, by S. L. Winters & George Burger, Their Attorneys.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL—Filed Oct. 21, 1940

[fol. 61] Comes now the appellants, Barney E. Gaskill, et al., and designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. The original Petition filed.

2. The various Motions of the defendants to dismiss the case for want of jurisdiction, on the ground that the petition fails to allege facts sufficient to establish requisite jurisdictional amount.

3. All the affidavits filed on behalf of plaintiffs, and also all affidavits filed on behalf of the defendants in resisting the motion and in support of the motion to dismiss.

4. The Findings and Judgment of the Court Dismissing the case signed by the Honorable J. A. Donohoe, United States District Judge, September 21, 1940.

5. Notice of Appeal.

6. Bond for Costs on Appeal.

7. Leave off all headings and verifications.

Barney E. Gaskill, et al., Plaintiffs, by S. L. Winters & Geo. Burger, Their Attorneys.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

CONCISE STATEMENT OF POINTS THAT APPELLANTS INTEND TO RELY ON—Filed October 21, 1940

1. The appellants, Barney E. Gaskill, et al., contend that under the record in this case, that the Court erred in dismissing the petition upon portions of the various motions of the various defendants for want of jurisdiction, on the [fol. 62] ground that the petition fails to allege facts sufficient to establish that the requisite jurisdictional amount of $3,000.00, exclusive of interest and costs, is in controversy as required by law.

2. Appellants contend that this is a class action within Rule 23 of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, permitting class actions to be brought

where there are several plaintiffs, and there is a common question of law or fact effecting the several rights and a common relief is sought, so as to permit the aggregating of the claims of all plaintiffs together in order to give the jurisdictional amount required by law.

3. Appellants contend that their rights are so interwoven and so connected that the rights of one cannot be determined without determining the relative rights of the other plaintiffs.

4. Appellants contend that their seniority rights are property rights which cannot be taken away from them without their consent, either by the union or by the defendant trustee representing the railroad company by whom they were employed, nor can the railroad itself deprive them of such right, and that the aggregate amounts involved includes not only what has already been earned, but what they might earn in the future, should be considered in determining a jurisdictional amount.

5. Appellants contend that the affidavits produced by the appellants, and the counter-affidavits produced by the defendants show that more than $3000.00 was involved in this law suit on the theory that this was a class action under Rule 23 as above described, and that their rights were so inseparable and interwoven, and that each plaintiff was a necessary party to determine the rights of the other plaintiffs and the other defendants, so they have the right to join in a single action to have their various rights determined and adjudicated as among themselves and as against the defendant union employees who took their places in one action. Therefore, the jurisdictional amount was clearly shown, and the Court erred in dismissing this proceeding on the ground that it was without jurisdiction to [fol. 63] hear and determine the cases for want of jurisdictional amount.

Barney E. Gaskill, et al., Plaintiffs, by S. L. Winters, Geo. Burger, Their Attorneys.

[File endorsement omitted.]

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 64-65] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

(Appearances of Counsel omitted in Printing.)

[fol. 66] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

MOTION OF APPELLEES GEORGE KIMBALL, ORDER OF RAILWAY CONDUCTORS, AND BROTHERHOOD OF RAILROAD TRAINMEN TO DISMISS APPEAL OR AFFIRM, BRIEF, NOTICE, AND ACKNOWLEDGEMENT OF SERVICE—Filed December 10, 1940

Come now George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen, three of the appellees herein, by J. M. Grimm, W. C. Fraser, and W. M. McFarland, their counsel, and show to this Court that notice of appeal to this Court dated October 14, 1940 was filed October 21, 1940; that a copy of the transcript of the record on appeal has not been received by these appellees, and information as to the contents thereof was obtained from the Clerk of this Court; that said transcript shows appellants filed their designation of portions of the record on October 21, 1940, but that the complete record was not thereby designated, as appears on the face of such designation, and that such designation was not served on these appellees or their counsel, and that these appellees were thereby deprived of their right to designate additional parts of the record; that if any designation of points to be relied on upon appeal was filed, no copy of any such designation or statement of points has been served upon these appellees or their counsel, and that no such statement or designation of points to be relied upon was filed within five (5) days after said transcript was filed in this Court.

Wherefore, these appellees move, if the same has not been duly done, that the case be docketed, and that this Court dismiss with costs the appeal taken herein to this Court by the appellants, upon the following grounds:

1. Appellants failed to serve their designation of the record on these appellees, in violation of Rule 75 (a) of the Rules of Civil Procedure for the District Courts of the [fol. 67] United States, (28 U. S. C. A., following Sec.

723 c), and in violation of Rule 25 (1) of the Rules of the Eighth Circuit Court of Appeals, which became effective September 16, 1938.

2. Appellants did not designate the entire record, and failed to serve a statement of points upon which they intended to rely on appeal, as required by Rule 75 (d) of the said Rules of Civil Procedure, and in violation of Rule 25 (4) of the said Rules of this Court.

3. That if any designation or statement of points to be relied on upon appeal was filed in the District Court, that the same was invalid for failure to serve the same, and was therefore improperly included in the transcript of the record on appeal to this Court.

4. That, although the notice of appeal was dated October 14, 1940, the record was not filed and the case not docketed in this Court until November 26, 1940, and hence not within forty (40) days from the date of the notice of appeal, in violation of Rule 73 (g) of said Rules of Civil Procedure, and Rule 27 of said Rules of this Court.

5. Although appellants did not serve, or to the knowledge of these appellees filed, or validly include in the transcript as filed, any statement of points to be relied on upon appeal to this Court, they failed to file any statement of such points in this Court which separately and particularly set out each error asserted and intended to be urged within five (5) days after filing said transcript in this Court, all in violation of Rule 24 (1) of said Rules of this Court.

6. That this Court has no jurisdiction as an appellate Court to hear and determine said appeal, for the reason that the same has not been perfected in compliance with the [fol. 68] said Rules of this Court or with the Rules of Civil Procedure.

In the alternative, said appellees move this Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest from the record that the lower Court was without jurisdiction to hear and determine any cause of action asserted by the appellants, and that this Court is therefore without appellate jurisdiction in the premises, other than to affirm the action and judgment of the lower Court.

Dated at Omaha, Nebraska, this 5th day of December, 1940.

J. M. Grimm, W. C. Fraser, W. M. McFarland, Attorneys for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

Brief

I.

Necessity for Dismissal of Appeal for Appellants' Failure to Comply with Court Rules Governing the Same.

Leimer v. *State Mutual Life Assurance Company of Worcester, Mass.*, 107 F. (2d) 1003, decided by the Eighth Circuit Court of Appeals, December 7, 1939, is squarely in point. The citation of additional authority to this Court, which has already considered and decided the exact questions herein involved, seems unnecessary.

[fol. 69]

II

The District Court Was Without Jurisdiction to Hear and Determine Any Cause of Action Asserted by Appellants Because of Lack of Jurisdictional Amount as to Any Appellant.

The facts as pleaded and as disclosed by the evidence on the question of whether the jurisdictional amount is involved as to any appellant, taken in the manner selected by the appellants, bring the case within the rule of *Clark* v. *Gray, et al.*, 306 U. S. 583, 83 L. Ed. 1001, and not within the rule of *Gibbs* v. *Buck, et al.*, 307 U. S. 66, 83 L. Ed. 1111.

The lower Court rightly held that the appellees, by their various motions and answers, had properly traversed the conclusion as pleaded that each appellant had a claim in excess of $3,000, as alleged in Paragraph Thirteen of their petition. By its ruling requiring the appellants to establish such conclusion as alleged, the lower Court properly placed the burden on the appellants to establish that the jurisdictional amount was involved as to each appellant. This was in conformity with the weight of authority, and

upon appellants' failure to sustain this burden the lower Court had no alternative but to sustain the motions to dismiss and enter judgment for the appellees.

McNutt v. *General Motors Acc. Corp.*, 298 U. S. 178, 80 L. Ed. 1135;

Kvos, Inc. v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183;

(See 81 L. Ed. pp. 197 and 205, for Annotation);
Town of Lantana, Fla. v. *Hopper*, 102 F. (2d) 118.

[fol. 70] Respectfully submitted, J. M. Grimm, W. C. Fraser, W. M. McFarland, Attorneys for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

NOTICE

To S. L. Winters and George P. Burger, Attorneys for Appellants, and Wymer Dressler, Attorney for Appellee Charles P. Megan, Trustee for the Chicago & Northwestern Railway Company, et al.:

Please take notice that the undersigned appellees in the above-entitled cause will move before the United States Circuit Court of Appeals for the Eighth Judicial Circuit, at the Court Room in the — Building in the City of St. Louis, State of Missouri, for an order dismissing the appeal in the above-entitled cause, and for such further relief as to the Court may seem fit and proper.

Such motion will be submitted to the said Court for consideration by the Clerk of that Court at the time and in the manner provided by the rules of that Court.

Attached is a copy of said motion and of brief in support thereof, which, together with this notice, are herewith served upon you.

Dated at Omaha, Nebraska, this 5th day of December, 1940.

[fol. 71] J. M. Grimm, W. C. Fraser, W. M. McFarland, Attorneys for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

Service of the attached motion, notice and brief is accepted, and receipt of copies thereof hereby accepted this 5th day of December, 1940.

S. L. Winters, George P. Burger, Attorneys for Appellants. Wymer Dressler, R. D. Neely, Attorneys for Appellee Charles P. Megan, Trustee for the Chicago & Northwestern Railway Company.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order Denying Motion of Certain Appellees to Dismiss Appeal and Passing Motion to Affirm, etc.—December 21, 1940

This cause came on to be heard on the motion of appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen, to dismiss the appeal or [fols. 72-73] in the alternative to affirm the judgment of the District Court appealed from, the answer thereto and briefs and memorandum of counsel.

After hearing Mr. W. M. McFarland, counsel for the movants, and Mr. S. L. Winters, counsel for appellants, It is ordered by the Court that the motion to dismiss, be, and is hereby, denied.

And it is further ordered by this Court that the motion of said movants to affirm the judgment of the District Court on the ground that said Court was without jurisdiction to hear and determine the cause and that this Court is therefore without appellate jurisdiction is passed for consideration at the time of the hearing of the merits of this appeal.

December 21, 1940.

(Orders of Argument and Submission omitted in printing)

[fol. 74] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

April 22, 1941

Mr. S. L. Winters (Mr. George Burger was with him on the brief) for Appellants.

Mr. Wymer Dressler (Mr. Robert D. Neely and Mr. W. T.

Faricy were with him on the brief) for appellee, Charles M. Thomson, Trustee.

Mr. W. M. McFarland (Mr. J. M. Grimm and Mr. W. C. Fraser were with him on the brief) for appellees, George Kimball et al.

[fol. 75] Before Woodrough, Johnsen and Van Valkenburgh, Circuit Judges

OPINION

WOODROUGH, Circuit Judge, delivered the opinion of the court.

This is a civil action against the Trustee in Reorganization of the Chicago & Northwestern Railway Company and others, brought by forty-one conductors and trainmen belonging to a class or group of the Trustee's employees known as the Nebraska Division of Trainmen. They allege in their petition that by virtue of certain written contracts entered into by the railroad and now obligatory upon the Trustee, the members of said Nebraska Division of Trainmen were accorded the right to perform the work of conductors and trainmen upon certain stretches or runs of the railroad between Omaha, Nebraska, and Sioux City, Iowa, but that although plaintiffs were at all times ready, willing and able to perform, the defendant has denied that the contracts accord the right to performance of the work to the members of said Nebraska Division of Trainmen or that the plaintiffs have the rights they claim, and has breached the contracts and does now and has continuously awarded the work to other persons.

It is alleged that the rights of the individual plaintiffs, members of the Nebraska Trainmen's Division, in respect to each other, are fixed by so called seniority rules by which defendant Trustee is bound, and that such individual rights are ascertainable by computation, but that the right of each is related to the right of the others, and that all of the members are necessary parties to such a determination. They seek a declaratory judgment that the defendant is now and has been obligated by the contracts to allot the said work to the members of the Nebraska Division of Trainmen, including the plaintiffs; they pray that an accounting be made of the amount and cost of the work that should have been allotted to the Nebraska Division of

[fol. 76] Trainmen members but which has been wrongfully allotted to others, and that the amount of work that each of the plaintiffs has been wrongfully deprived of be determined, and that judgment be given each of the plaintiffs for such an amount as he would have earned if his right to perform the work had not been wrongfully denied him.

A member of the Sioux City Division of the Chicago & Northwestern Trainmen was made a party defendant to the petition and subsequently an order was entered making the Brotherhood of Railroad Trainmen and Order of Railway Conductors parties defendant.

Issues were joined by the Trustee in Reorganization but all parties defendant questioned the jurisdiction of the District Court as to the amount in controversy, diversity of citizenship being conceded. The court tried out the question of the amount in controversy separately and prior to trial of the merits of the case and evidence was adduced pro and con in the form of affidavits. The court found that the claims of the plaintiffs were separable and could not be aggregated to make up the jurisdictional amount and that no plaintiff had shown the requisite amount involved as to his claim; that the evidence submitted by the defendants, considered together with the allegations of the petition, established that the amount in controversy as to any one plaintiff did not reach to the requisite sum, and the case was dismissed for want of jurisdiction. From the order of dismissal the plaintiffs have appealed.

Opinion

The only question here is whether the matter in controversy in the action exceeds the sum or value of $3,000.00, exclusive of interest and costs, so as to give the District Court jurisdiction. Jud. Code § 24 (1), 28 U. S. C. A. 41 (1). The complaint alleged that the requisite amount was involved, but the District Court adopted and followed a fair and proper procedure to determine the facts upon [fol. 77] which its jurisdiction depended,[1] and the evidence which was adduced by the parties upon the issue and con-

[1] *Gibbs* v. *Buck*, 307 U. S. 66, loc. cit. 72, 73, 74, 75. "As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court."

sidered by the court has been properly brought up on this appeal.

The trial court was persuaded upon the showing made that the work that any one of the plaintiffs could claim to have lost up to the filing of the petition would not have amounted to $3,000.00, and that no one of the plaintiffs had a claim of loss for deprivation of work amounting to $3,000.00 up to that time, and we think the evidence supports that conclusion of the court.

But we are of the opinion that the criterion adopted for determination of the matter in controversy in the action and the value thereof was erroneous. Our conclusion is that the essential matter in controversy disclosed by the pleadings and the evidence is the right of the members of the Nebraska Division of Trainmen, identified by their membership in that group or class, to perform the work of conductors and trainmen upon the stretch or run of railroad described in the complaint. The railroad has denied the right and does now and will continue to deny the right to the Nebraska Division of Trainmen—that is, to the class or group of workmen which asserts and claims it. That is the dispute and that defines the essential matter in controversy. Under these circumstances the issue on jurisdiction is the value of the right of the Nebraska Division of Trainmen to carry on through its members the work they claim the several contracts of the railroad have allotted to the Nebraska Division of Trainmen. Although no individual plaintiff has yet lost the sum of $3,000.00 through being deprived of the claimed right to do the work, the testimony very clearly establishes that the amount involved in the controversy, as we have stated it, does greatly exceed the jurisdictional requirement. The trainmen and con- [fol. 78] ductor wages on the designated runs for the life of the contracts will greatly exceed $3,000.00.

We think that the principles that governed decision in *Gibbs* v. *Buck*, 307 U. S. 66, are applicable to this case and require us to hold that the matter in controversy—the value of the aggregate rights of all the members of the Nebraska Division of Trainmen to be allotted work while the alleged contracts continue and to recover a sum of money as damages for work heretofore wrongfully denied them—exceeds $3,000.00 in value and that the case is within federal jurisdiction. It is true the facts in *Gibbs* v. *Buck*, *supra*, may be distinguished in many respects from those here involved.

There the members of the society of composers, authors and publishers were prohibited by the Florida statute from combining in the form of such society to carry on the business of licensing their productions. Here the railroad has not prohibited the plaintiffs from membership in the Nebraska Division of Trainmen, but the reason for its refusal of the work to the plaintiffs is that another Division of Trainmen, and not the Nebraska Division, is entitled. The prohibition against doing the work is against the class and the plaintiffs constitute the class. No individual plaintiff can obtain any relief in the action until their collective right as a class is established. The common and collective right of the conductors and trainmen to recognition by the railroad of their Nebraska Division of Trainmen is fairly analogous to the common and collective right of the authors and publishers to preserve the immunity of their society from the action of the State of Florida considered in the Gibbs case. As in that case, these plaintiffs have a common and undivided interest in the matter of establishing the right of their class. The aggregate value of the work claimed by the class is therefore the criterion for jurisdiction.

The appellees cite *Clark* v. *Gray*, 306 U. S. 583; *KVOS Inc.* v. *Associated Press*, 299 U. S. 269, and *McNutt* v. *Gen-*
[fol. 79] *eral Motors Acceptance Corp.*, 298 U. S. 178, as compelling an opposite conclusion. In *Clark* v. *Gray* each of the plaintiffs was a taxpayer and each sought to enjoin a tax applicable to him and we do not find the decision that each was required to show the jurisdictional amount involved as to him to be relevant in this case. In *KVOS Inc.* v. *Associated Press* the plaintiff sought to enjoin certain wrongful conduct which threatened damage to plaintiff's business, but there was failure to prove that the threatened damage would equal $3,000.00. *McNutt* v. *General Motors Acceptance Corp.* went off on the failure of proof or findings upon the issue of fact whether or not the jurisdictional amount was involved.

None of the cases called to our attention seems to us to be contrary to our conclusion here, that the matter in controversy here is of the value of more than $3,000.00. We have found the plaintiffs' petition very difficult of analysis and have stated its intendments as we understand them, most favorably to the pleader, for the purpose of passing on the sole question of jurisdiction raised on the appeal.

We have not considered any question going to the merits of the case or the sufficiency of the pleadings.

The judgment of dismissal is reversed and the cause remanded.

[fols. 80-93] In United States Circuit Court of Appeals, Eighth Circuit

Barney E. Gaskill, et al., Appellants,

vs.

Charles M. Thomson, Trustee for Property of Chicago and Northwestern Railway Company, George Kimball and the Order of Railway Conductors and Brotherhood of Railroad Trainmen

Judgment—April 22, 1941

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that Barney E. Gaskill, et al., have and recover against Charles M. Thomson, Trustee for property of Chicago and Northwestern Railway Company, George Kimball and the Order of Railway Conductors and Brotherhood of Railroad Trainmen the sum of —— Dollars for their costs in this behalf expended to be collected according to law.

It is further ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for proceedings not inconsistent with the opinion of this Court this day filed herein.

April 22, 1941.

[fol. 94] Petition for Rehearing covering 13 pages, filed May 5, 1941, omitted from this print. It was denied, and nothing more by order of May 9, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DENYING PETITION FOR REHEARING—May 9, 1941

The petition for rehearing filed by counsel for the appellees having been considered, It is now here Ordered by this Court that the same be, and it is hereby denied.

May 9, 1941.

[fol. 95] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF APPELLEES FOR STAY OF MANDATE—Filed May 15, 1941

To Honorable Joseph W. Woodrough, Arba S. Van Valkenburgh, and Harvey Johnsen, Circuit Judges of the Circuit Court of Appeals for the Eighth Circuit:

Your said petitioners respectfully present this, their application for, and move the Court to enter, an order staying and withholding the Mandate in this case, under the provisions of Section 350 of Title 28 of the United States Code, and pursuant to Rule 19 of the Rules of this Court, because it is the bona fide intention of said appellees to make proper application to the Supreme Court of the United States for writ of certiorari in this case within the next thirty (30) days.

The grounds upon which said petition for certiorari will be based are substantially as follows:

1. The decision of said Circuit Court of Appeals as to the right of a group of plaintiffs to aggregate their claims for jurisdictional purposes is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. (2d) 85, and *Hackner* v. *Guaranty Trust Co.*, 117 F. (2d) 95, and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Atwood* v. *National Bank of Lima*, 115 F. (2d) 861.

2. The said decision of the Eighth Circuit Court of Appeals as to the existence of jurisdiction in the Federal District Court in an action of the class as defined in Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure

[fol. 96] for the District Courts of the United States, by holding that the several and distinct claims of the various plaintiffs could be aggregated for jurisdictional purposes, is a decision of a Federal question in conflict with the distinction made by the two decisions of this Court rendered on the same day, namely, *Gibbs* v. *Buck*, 307 U. S. 66, 83 L. Ed. 1111, and *Clark* v. *Gray*, 306 U. S. 583, 83 L. Ed. 1001.

3. The said decision of said Circuit Court of Appeals as to the jurisdiction of the District Court, by holding that respondents' several claims if alleged to be based on "collective" rights can be aggregated for jurisdictional purposes, even though the evidence taken on the jurisdictional question is undisputed that no such collective rights are involved and the case is of the "spurious" type of class action, is an erroneous decision of an important question of general law and in conflict with the weight of authority.

4. The said decision of the said Circuit Court of Appeals as to jurisdiction of the District Court by holding that in a "spurious" type of class action the several claims of the plaintiffs could be aggregated for jurisdictional purposes, and in considering the value of collective rights not involved in the controversy, so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

The reason why a stay is deemed necessary is that there is not sufficient time left within which to prepare and file said petition for said writ.

In support hereof appellees attach the professional state-
[fol. 97] ment of one of their counsel, W. M. McFarland of Omaha, Nebraska.

Wymer Dressler, Robert D. Neely, Counsel for Appellee, Charles M. Thomson, Trustee. J. M. Grimm, W. C. Fraser, W. M. McFarland, Counsel for Appellees George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

I hereby certify that it is the bona fide intention of the appellees to make application to the Supreme Court of the United States for a writ of certiorari within the next thirty

(30) days, and that I believe there is merit in their case, and that the judgment of the United States Circuit Court of Appeals ought to be reversed by the Supreme Court of the United States.

W. M. McFarland, Counsel.

[File endorsement omitted.]

[fol. 98] In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—May 17, 1941

On Consideration of the motion of appellees for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 17, 1941.

[fol. 99] In United States Circuit Court of Appeals

Praecipe for Transcript for Supreme Court, U. S.—Filed May 15, 1941

To the Clerk of the Circuit Court of Appeals:

Please complete the present printed record for presentation to the Supreme Court of the United States on application for certiorari by including the following:

Motion of appellees George Kimball et al. to dismiss.
Order of Court denying motion and withholding ruling on motion to affirm until final hearing.
Order of argument and submission.
Opinion.
Judgment.

Petition of Appellees for rehearing.
Order denying said petition.
Motion to withhold mandate.
Order granting said motion.

Wymer Dressler, W. M. McFarland, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 100] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 101] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 45,467, U. S. Circuit Court of Appeals, Eighth Circuit, Term No. 139, Charles M. Thomson, Trustee for Property of Chicago & Northwestern Railway Company, et al., Petitioners, vs. Barney E. Gaskill, et al. Petition for a writ of certiorari and exhibit thereto. Filed June 6, 1941. Term No. 139 O. T. 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; AND BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

vs.

BARNEY E. GASKILL, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; AND BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioners and Appellees Below,

vs.

BARNEY E. GASKILL, ET AL.,
Respondents and Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

This was an action at law brought in the United States District Court for the District of Nebraska, Omaha Divi-

sion, by Barney E. Gaskill and forty other conductors and brakemen. All plaintiffs are employees of the Chicago & Northwestern Railway Company (hereinafter called C. & N. W.), on the Nebraska Division of the C. & N. W. The action was against Charles M. Thomson, Trustee for the C. & N. W. George Kimball, an employee of the C. & N. W. Sioux City Division, was "made a defendant here as a representative of said division, for the reason that the members vary and the names are unknown, so that he may if he so desires represent said Sioux City Division of Railway Trainmen and Conductors." (R. 4) Kimball was not sued as a representative of the employees of that division (R. 4, Par. 7), but merely invited to represent that division of the Brotherhoods. Because of this the District Court, on motion of the Railway Company, ordered the Brotherhoods to be made parties defendant (R. 15), and they came in and assumed positions adverse to respondents to defend the integrity of their agreements with the managements of both railroads.

The plaintiffs, who are now the respondents, sought separate and independent money judgments against their employer, the C. & N. W., for damages resulting from the alleged failure to allot the work on certain interrailroad runs between Omaha, Nebraska, and Sioux City, Iowa, in accordance with alleged seniority on trackage between California Junction, Iowa, and Omaha, Nebraska, claimed under collective bargaining agreements between the employer and the two Railroad Brotherhoods, demanding an accounting and that the C. & N. W. "be compelled to recognize plaintiffs' seniority rights in said work by the Sioux City Division * * *" (R. 7).

The question involved is whether the District Court was right in dismissing respondents' petition for want of jurisdiction. The petition alleged diversity of citizenship and that more than $3,000.00 was involved as to each plaintiff.

Petitioners challenged the allegations as to jurisdictional amount involved by motion to dismiss, supported by affidavits of fact disproving those allegations of the petition (R. 16, 19, 35 and 36).

None of the exceptions in Sec. 24 of the Judicial Code, Sec. 41, Title 28, U. S. C. A., apply here, and hence the District Court was without jurisdiction if the requisite jurisdictional amount was not involved.

The District Court refused to proceed further until the jurisdictional questions were tried out, and required the parties to submit evidence in such form as they chose (R. 25).

This evidence established the earnings possible from the various portions of the runs in question (R. 45-46, 52-53) and the facts as hereinafter summarized.

Both lower courts held that the evidence established that no individual respondent's claim amounted to enough to meet the jurisdictional requirements of Sec. 41 (1), Title 28, U. S. C. A. Jurisdiction, therefore, depended upon whether (1) respondents' action was such a class action as to permit aggregation of their claims for jurisdictional purposes, and (2) if such aggregation was permissible only as to certain kinds of such claims, was the aggregate thereof sufficient?

The facts in the record consisting of the respondents' petition and the affidavits used in support of the petitioners' motion to dismiss for want of jurisdiction (R. 39-56) show: that Chicago, St. Paul, Minneapolis and Omaha Railway Company (hereinafter called C. St. P. M. & O.) owns and operates a line of railroad from Omaha, Nebraska northwestward to Blair, Nebraska, and northward to Sioux City, Iowa, all on the west side of the Missouri River until it crosses the river opposite Sioux City (R. 41); that employees of that Company have seniority on that Company's lines only as the result of collective bargaining (R. 42);

that C. & N. W., so far as this case is concerned, owns lines of railroad in Nebraska, including one from Fremont, Nebraska, eastward to Blair, where it crosses the C. St. P. M. & O., and on across the river to California Junction, Iowa, and northerly on the east side of the Missouri River to Sioux City, Iowa; that the stretch between Blair and California Junction is part of the Nebraska Division of that Company (R. 41); that the C. & N. W. employees, of which respondents are only a few, hold seniority rights only over C. & N. W. tracks on the Nebraska Division as a result of collective bargaining between the Brotherhoods and that Company's management (R. 42); and that respondents have no seniority rights whatever over the portion of the C. St. P. M. & O. tracks between Omaha and Blair (R. 43).

Because of heavy grades over the C. St. P. M. & O. west of the Missouri River, the managements of the two Companies have operated trains primarily carrying C. St. P. M. & O. freight between Omaha and Sioux City running between Omaha and Blair on the C. St. P. M. & O. track and from Blair across the Missouri River to California Junction on the C. & N. W. track, thence north to Sioux City on the east side of the river on the C. & N. W. tracks (R. 43). This operation has been in effect for over six years (R. 43). It gave rise to a complaint by the employees of the C. St. P. M. & O. who had theretofore handled traffic of that Company west of the river, that they were being deprived of work and ought to be allowed to participate in the transportation of C. St. P. M. & O. freight via the new route. The Brotherhoods and the managements of both railroads subsequently agreed that instead of C. & N. W. crews of the Sioux City Division handling all of the traffic on the new route between Omaha and Sioux City, a certain number of crews of the C. St. P. M. & O. should be allowed to operate between Omaha and Sioux City on the new route in pro-

portion as the mileage of the C. St. P. M. & O. was to the mileage of the C. & N. W. tracks on that run (R. 44). These runs are the runs described in respondents' petition as now being sought by respondents as employees of C. & N. W. Nebraska Division, and they are interrailroad runs and not merely interdivisional runs. The agreement referred to in paragraph 12 of respondents' petition was an interrailroad agreement between separate railroads concurred in by the Brotherhoods. It did not affect the relations between the Nebraska Division employees and the Sioux City Division employees, except that Sioux City Division employees, as a part of the new route between Sioux City and Omaha via Blair operated over 7.5 miles of track which was a part of the Nebraska Division of the C. & N. W. between Blair and California Junction (R. 45). But that mileage was continued open to all Nebraska Division employees in handling trains originating upon or destined to the Nebraska Division of the C. & N. W. Notwithstanding these facts, under oath in the Record, paragraph 8 of respondents' petition alleged that the C. St. P. M. & O. tracks between Omaha and Blair are part of the Nebraska Division of the C. & N. W. (R. 10). The Circuit Court of Appeals apparently adopted this unsupported statement as the real fact, notwithstanding it was shown by sworn proof to be untrue. (Affidavits of Nemitz, R. 39; Jones, R. 46; Stephens, R. 54.)

On the record the District Court found (R. 56) that (a) no individual respondent's claim involved the requisite jurisdictional amount, and (b) that the nature of the action was not such as to permit the respondents to aggregate their claims for jurisdictional purposes, and dismissed the action and entered judgment for these petitioners.

Respondents appealed to the Circuit Court of Appeals, which sustained the District Court as to (a) above, but reversed it as to (b), holding that the alleged seniority rights "described in the petition" were "collective rights" suffi-

cient to permit respondents to aggregate such collective claims for jurisdictional purposes, and that upon such aggregation the requisite jurisdictional amount was involved (R. 72-77).

II.

Jurisdictional Statement.

The judgment of reversal by the Court of Appeals was on April 22, 1941. Petition for rehearing denied May 9, 1941. Jurisdiction of this Court to review the decision is claimed under Section 240, Title 28, Par. 347, U. S. Code, Ann.

III.

Questions Presented.

The questions presented are:

1. Whether the District Court was right in dismissing the case for want of jurisdiction.

2. Whether the District Court had jurisdiction of this case.

3. Whether respondents were entitled to aggregate their claims for jurisdictional purposes.

4. Whether the Circuit Court of Appeals erred in holding that aggregation of claims for collective rights could be had for jurisdictional purposes, when the evidence established without dispute that the controversy was over interrailroad runs as to which no respondent had any seniority or collective right whatever by virtue of the alleged collective agreements or otherwise.

5. Whether the Circuit Court of Appeals erred in holding that the aggregate value of respondents' collective claims was at least equal to the requisite jurisdictional amount and sufficient to give the District Court jurisdiction where respondents did not sustain the burden of proof after the jurisdictional allegations were appropriately challenged.

IV.

Reasons Relied On for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Eighth Circuit as to the right of a group of plaintiffs to aggregate their claims for jurisdictional purposes is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. (2d) 85, and *Hackner* v. *Guaranty Trust Co.*, 117 F. (2d) 95, and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Atwood* v. *National Bank of Lima*, 115 F. (2d) 861.

2. The said decision of the Eighth Circuit Court of Appeals as to the existence of jurisdiction in the Federal District Court in an action of the class as defined in Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States, by holding that the several and distinct claims of the various plaintiffs could be aggregated for jurisdictional purposes, is a decision of a Federal question in conflict with the distinction made by the two decisions of this Court rendered on the same day, namely, *Gibbs* v. *Buck*, 307 U. S. 66, 83 L. Ed. 1111, and *Clark* v. *Gray*, 306 U. S. 583, 83 L. Ed. 1001, and in conflict with *Hansberry* v. *Lee*, 311 U. S. 32, 85 L. Ed. 11.

3. The said decision of said Circuit Court of Appeals as to the jurisdiction of the District Court, by holding that respondents' several claims if alleged to be based on "collective" rights can be aggregated for jurisdictional purposes, even though the evidence taken on the jurisdictional question is undisputed that no such collective rights are involved and that only interrailroad runs were involved, and the case is of the "spurious" type of class action, is an erroneous decision of an important question of general law and in conflict with the weight of authority.

4. The said decision of the said Circuit Court of Appeals as to jurisdiction of the District Court by holding that in a "spurious" type of class action the several claims of the plaintiffs could be aggregated for jurisdictional purposes, and in considering the value of collective rights not involved in the controversy, so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket Number 11895 Civil, *Barney E. Gaskill, et al., Appellants,* v. *Charles M. Thomson, Trustee, etc., et al., Appellees,* to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated May 31st, 1941.

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Order of Railway Conductors, and
Brotherhood of Railroad Trainmen.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 74) is reported in —— F. (2d) ——.

II.

Jurisdiction.

1. The date of judgment to be reviewed is April 22, 1941. Petition for rehearing was denied May 9th, 1941.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240, Judicial Code, Title 28, Sec. 347, U. S. C. A.

3. The Circuit Court of Appeals conceded that no respondent's claim involves the requisite jurisdictional amount (R. 74), (which also seems to be conceded by respondents' Statement of Points on Appeal, R. 61-62), but seemingly on the ground that collective rights as "described in the (plaintiff's) petition" are involved (R. 75), that court held that respondents' claims may be aggregated (R. 74-76). The evidence shows no such collective rights are involved, and that only a "spurious" type of class action is involved here. If the decision is permitted to stand it will be in conflict with the distinction made by this Court in permitting aggregation of claims for jurisdictional purposes in true class actions, as defined in Clause (1) of Rule 23 (a) of said Federal Rules of Civil Procedure, as was permitted by this Court in *Gibbs* v. *Buck, supra,* and in refusing such aggregation in the "spurious" type of class action referred to in Clause (3) of said Rule 23 (a), and as denied by this Court in *Clark* v. *Gray, supra.*

Said decision of said Circuit Court of Appeals is also in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit and for the Sixth Circuit, as referred to in the foregoing petition, in holding that the several claims of plaintiffs may be aggregated for jurisdictional purposes in a "spurious" type of class action.

4. The cases believed to sustain said jurisdiction in this Court to review this case are:

Gibbs v. *Buck, supra;*
Clark v. *Gray, supra;*
Gay v. *Ruff*, 292 U. S. 25, 78 L. Ed. 1099;
KVOS, Inc., v. *Associated Press*, 299 U. S. 269, 81 L. Ed. 183;
McNutt v. *General Motors Accept. Corp.*, 298 U. S. 178, 80 L. Ed. 1135.

III.

Statement of the Case.

A summary statement is included in the preceding petition under I (pp. 1-6), which is hereby adopted and made a part of this brief. The following additional statement is given (R. 39 to 54):

(See plat, appendix to Brief.)

For operating purposes, the C. & N. W. is separated into the Sioux City Division, which covers the trackage of this railroad alone from Sioux City, Iowa, to California Junction, Iowa, and the Nebraska Division, which covers the trackage of the C. & N. W. alone from California Junction, Iowa, west across the Missouri River to Blair, Nebraska, Fremont, Nebraska, and points west.

The trackage between Blair, Nebraska, and Omaha, Nebraska, is both owned and operated by the C., St. P., M. & O. This trackage between these two points is not a part or portion of either the Sioux City Division or the Ne-

braska Division of the C. & N. W., as such trackage is neither owned by the C. & N. W., nor under its management.

The respondents are all employees of the C. & N. W., and work in the Nebraska Division thereof. The respondents are not now, and never have been, employees of the separate railroad known as the C., St. P., M. & O.

As hereinafter used, the term "interdivisional run" means a run upon the tracks of the same employer covering a part of two operating divisions, i. e., from Blair, Nebraska, on the C. & N. W. tracks in the Nebraska Division, to California Junction, Iowa, thence northerly on the tracks of the C. & N. W. to Sioux City in the Sioux City Division, or vice versa. An "interrailroad run" simply means a train operated by the same crew over the tracks of two separate railroads, i. e., from Omaha, Nebraska, to Blair, Nebraska, over the C., St. P., M. & O., and thence either east over the C. & N. W. tracks to California Junction, or west on the C. & N. W. tracks to Fremont, Nebraska.

In this case the seniority districts of the employees of the C. & N. W. correspond to the operating divisions made and designated by the C. & N. W., i. e., the Sioux City Division of the railroad also constituted the Sioux City Division seniority district, and the Nebraska Division of the C. & N. W. also constituted the Nebraska Division seniority district.

The division of the work on the interrailroad runs involved had previously been settled by agreement between the railroads and the Railway Brotherhoods. This agreement divided these runs between Sioux City Division C. & N. W. employees and employees of C., St. P., M. & O.

The Circuit Court of Appeals, in the opinion filed, stated:

> "Our conclusion is that the essential matter in controversy disclosed by the pleadings and the evidence

is the right of the members of the Nebraska Division of trainmen, identified by their membership in that group or class, to perform the work of conductors and trainmen upon the stretch or run of railroad described in the complaint" (R. 74-75).

The "* * * stretch or run of railroad described in the complaint" covered, and the runs in question were inter-railroad runs over, the trackage of the two separate railroads, namely, the trackage between Omaha, Nebraska, and Blair, Nebraska, of the C., St. P., M. & O., and the trackage from Blair, Nebraska, to California Junction, Iowa, of the C. & N. W.

The record is conclusive and without dispute that none of the respondents are employees of C. St. P. M. & O., and that the C. & N. W. did not own or manage the trackage between Blair, Nebraska and Omaha, Nebraska, and that respondents, not being employees of the C., St. P., M. & O., had no seniority rights or any other rights over this line of railroad (R. 39-54).

It is nowhere alleged or claimed in respondents' petition that the C. & N. W., or the two Railroad Brotherhoods, or George Kimball as representative of anyone failed or refused to give plaintiffs recognition for any part of runs on the C. & N. W. tracks which did in fact constitute an inter-divisional run or their proper percentage thereof based upon the mileage on the C. & N. W. tracks in the Nebraska Division thereof. Respondents predicated their alleged right, which they claimed had been denied, not upon the tracks of the C. & N. W. between Blair, Nebraska and California Junction, Iowa, a distance of approximately 7½ miles, which as to C. & N. W. runs is within their seniority district without dispute, but sought to include within their alleged seniority district the trackage of the independent and separate railroad, the C., St. P., M. & O., between Blair, Nebraska, and Omaha, Nebraska.

Respondents were seeking to compel the C. & N. W. and its employees in the Sioux City Division, to grant rights to a mileage percentage over the tracks of a separate and independent railroad system, the C., St. P., M. & O., which obviously neither the management of the C. & N. W., nor the employees of the C. & N. W. in the Sioux City Division, were in a position to control or provide for. Thus respondents' actual objective was to have a mileage percentage of work on the Sioux City Division of the C. & N. W., and to have this computed not upon the mileage operated by the C. & N. W. employees of the Sioux City Division on the tracks of the C. & N. W. in the Nebraska Division, but upon a mileage basis which included approximately 23 miles of track over a separate railroad, to-wit, the tracks of the C., St. P., M. & O. between Blair, Nebraska, and Omaha, Nebraska.

IV.

Specification of Errors.

The said Circuit Court of Appeals erred as follows:

1. In failing to sustain the action of the District Court dismissing the case for want of jurisdiction.

2. In holding that the District Court had jurisdiction of this case.

3. In holding that the respondents were entitled to aggregate their claims for jurisdictional purposes.

4. In basing its opinion on its own misinterpretation of respondents' petition to the effect that the controversy was over interdivision runs over the tracks of the same railroad, and holding as a result that aggregation of claims for collective rights in regard thereto could be had for jurisdictional purposes, when the respondents' petition and the evidence taken on the jurisdictional question established

without dispute that the controversy was over interrailroad runs as to which no respondent had any seniority or collective right whatever by virtue of the alleged collective agreements or otherwise.

5. In holding that the aggregate value of respondents' collective claims were at least equal to the requisite jurisdictional amount and sufficient to give the District Court jurisdiction where respondents did not sustain the burden of proof after the jurisdictional allegations were appropriately challenged.

ARGUMENT.

Summary of Argument.

Point A. Respondents have not sued or asserted any claims as a class and have no common or joint title or interest in the claims of each other. Their action is of the "spurious" type in which aggregation of claims for jurisdictional purposes is not permissible.

Point B. No collective rights of respondents are involved, since the controversy is as to interrailroad, and not merely interdivision runs, and the collective agreements give seniority rights only over railroad runs over the trackage of the contracting railroad employer. Such collective rights could not, therefore, be considered in determining whether respondents' claims could be aggregated for jurisdictional purposes.

Point C. There being no collective rights involved, the value of such rights is nil whether aggregated or not, and respondents failed to sustain the burden of proof on them as to the challenged allegations of jurisdiction.

Point A. Respondents did not sue as a class, sought no relief and asserted no claims for themselves or on behalf of

others as a class. The individual and personal nature of each respondent's cause of action, as distinguished from any assertion of class rights, is clearly shown by such allegations as (a) in Par. 13 of their petition, (R. 6) as to damage, "to each of said plaintiffs herein", (b), in Par. 17, (R. 6), damages "that each have sustained", and (c) in the prayer (R. 7) seeking judgments "in favor of each individual plaintiff for the amount due him."

Other than as to their "collective rights", on which the Circuit Court of Appeals relied so heavily, and which will be subsequently discussed, there are no claims asserted in which the respondents claim any common interest or title. The only community of interest is in the common questions of law or fact affecting their several rights, and in the similar relief which each respondent seeks. Such an action, if a class action at all, is only one of the "spurious" type covered by Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States, Title 28, following Sec. 723 (c), U. S. C. A.

As Judge Clark of the Second Circuit Court of Appeals said in *Hackner* v. *Guaranty Trust Co.*, 117 F. (2d) 95:

> "The interests of all are in common and involve a common question of law and fact. The prayer for relief was for an accounting, damage for the loss sustained by all noteholders. * * * The sole question is whether or not the amount in controversy exceeds, exclusive of interest and costs, $3,000.00. * * * Aggregating to make up the jurisdictional amount is permitted only when the claims are of a joint nature, as when it is sought to enforce a single title in which the plaintiffs have a common interest. * * * A class could be found only in the 'spurious' sense (See 2 Moore's Fed. Practice, 2241), that a common question of law and fact was involved. Among parties so related aggregation is improper. * * * "

The Eighth Circuit Court of Appeals, in holding that this case was controlled by *Gibbs* v. *Buck, supra,* seems to have

erroneously assumed (1) that the respondents were all the conductors and brakemen working for the C. & N. W. in its Nebraska Division and that all had a common interest in this litigation, (the Court says (R. 76) the plaintiffs "constitute the class"), and (2) that the particular operating division of that railroad was analogous to ASCAP in the *Gibbs* v. *Buck* case.

That there are other conductors and brakemen working in said operating division with higher seniority rank, is shown by the seniority numbers listed in respondent's affidavits (R. 25 to 35). It necessarily follows that others in that Division having greater seniority than these respondents, and hence having attractive runs over C. & N. W. trackage secure from encroachment by employees of other railroads, are not interested in or desirous of having the respondents' succeed in the litigation, which might permit the employees of another railroad to assert seniority rights over C. & N. W. trackage.

The Division involved is not the local subdivision of the Brotherhoods, but the operating division of the railroad which, unlike ASCAP, is not an organization of the employees working therein and has no officers, activities or functions in that regard. This Division neither collects nor distributes moneys for such employees, and none of them has any common interest or title in what any other employee receives, and none is asserted. The only relation of respondents to this Division is that they work therein and their seniority rights are confined to C. & N. W. runs over C. & N. W. trackage in that Division.

The respondents are merely a part of a group working for the same employer in the same State and under the same form of employment agreement. In seeking a common immunity from an alleged restriction on their means of earning a livelihood, they are in exactly the same situation as the plaintiffs in *Clark* v. *Gray*, *supra*, in that "there are numerous plaintiffs having no joint or common interest or

title in the subject matter of the suit", and hence whose "only community of interest is in questions of law or fact." In such a situation, the rule of *Clark* v. *Gray, supra,* as it is now being applied by the other Circuit Courts of Appeal in *Central Mexico Light & Power Co.* v. *Munch, supra, Hackner* v. *Guaranty Trust Co., supra,* and *Atwood* v. *National Bank of Lima, supra,* is the correct rule. See also, "*Class Suits and the Federal Rules*", by Prof. Lesar, 22 Minn. Law Review, 34; *Kvos, Inc.* v. *Associated Press, supra*; *McNutt* v. *General Motors Accept. Corp., supra*; *Stucker* v. *Roselle,* 37 F. Supp. 864.

Point B. The Eighth Circuit Court of Appeals, in holding that the foregoing principles did not apply, and that the rule in *Gibbs* v. *Buck, supra,* did apply, relied on its own misinterpretation as to "collective rights" being involved. But for its erroneous concept of the controversy involved, there would have been no collective rights for the Circuit Court of Appeals to have considered in holding that the respondents had such a community of interest in the controversy as to permit them to aggregate their claims for jurisdictional purposes.

That court said the controversy was over the right of the C. & N. W. Nebraska Division employees "to perform the work of conductors and trainmen upon the stretch or run *described in the complaint*". (Italics ours), (R. 75), and that "the reason for its (the C. & N. W.'s) refusal of work to the plaintiffs is that another Division of trainmen and not the Nebraska Division is entitled" (R. 75-76).

Since it is established by the record as a fact (R. 39 to 54) that the tracks of the C. & N. W. do not run between Blair, Nebraska, and Omaha, Nebraska, and such tracks are not under the jurisdiction of the management of the C. & N. W., or the employees of the C. & N. W. in either the Sioux City Division or the Nebraska Division, and respondents are not employees of the C. St. P. M. & O., it is

at least clear that respondents could have no collective right to perform the work "• • • upon the stretch or run of railroad described in the complaint." "The • • • stretch or run of railroad described in the complaint" was from Omaha, Nebraska, to Blair, Nebraska, over the C. St. P. M. & O., and from Blair, Nebraska to California Junction, Iowa, over the C. & N. W. None of the employees of the C. & N. W. had any seniority rights on the trackage of the foreign road between Blair, Nebraska and Omaha, Nebraska, irrespective of whether they were of the Nebraska Division or the Sioux City Division of the C. & N. W.

Respondents do not allege in their complaint that the C. & N. W. has denied to them or any employee of the Nebraska Division offsetting runs on the Sioux City Division equal to the runs made by Sioux City Division men over the 7.5 miles between Blair and California Junction, so there is no occasion to consider that mileage alone in calculating the jurisdictional amount.

On the contrary, respondents have limited the controversy to a complaint against the distribution of interrailroad runs resulting from the agreement between the Brotherhoods and the managements of both railroads, as stated in Paragraph 12 of the complaint (R. 5). Obviously, employees of the Nebraska Division as a whole, and as represented by the Brotherhoods in this suit, are more vitally concerned with the protection of their seniority on C. & N. W. rails as against employees of some other railroad such as the C. St. P. M. & O. than they are in the success of these individual respondents in their attack upon the interrailroad agreements made with the managements of those two railroads. The interests of the employees of the Nebraska Division of the C. & N. W. as a whole are therefore potentially conflicting with the interests of these individual respondents in their attack upon the said interrailroad agree-

ments. This presents a situation similar to that found in *Hansberry* v. *Lee*, 311 U. S. 32, 85 L. Ed. 11.

These interrailroad runs have nothing whatever to do with respondents' collective rights as to seniority over C. & N. W. runs solely on C. & N. W. trackage, which is the only seniority given to respondents by the collective agreements referred to in their petition. *Shaup* v. *Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327; *Ryan* v. *New York Central*, 267 Mich. 202, 255 N. W. 365; *Geo. T. Ross Lodge No. 831, et al.* v. *B. R. T.*, 191 Minn. 373, 254 N. W. 590: *"Seniority Rights Under Labor Union Working Agreements"* by Prof. Christensen, 11 Temple Quarterly, 355.

The result of a failure to apply such limitations to the rights here asserted can be traced as follows:

(1) Neither the runs themselves nor work in the C. & N. W. Sioux City Division on a mileage percentage basis, can be given to two different groups of workers at the same time for the same runs over the same trackage.

(2) C. & N. W. Sioux City Division employees, by virtue of the agreement between the railroads and the Railway Brotherhoods referred to in paragraph 12 of respondents' petition, already are giving to C. St. P. M. & O. employees work on, or allowing a mileage percentage for these runs based on, the 23 miles between Blair and Omaha.

(3) To give such work or a similar mileage percentage to C. & N. W. Nebraska Division employees without ceasing to give such to C. St. P. M. & O. employees would constitute a double payment by C. & N. W. Sioux City Division employees for the same operation.

(4) Thus, if such work or mileage percentage is obtained by C. & N. W. Nebraska Division employees, such must al-

most certainly be done at the expense of the C. St. P. M. & O. employees, and they are not even parties to this litigation.

(5) If anyone has any seniority as to the portion of these runs between Omaha and Blair, it is the C. St. P. M. & O. employees.

(6) The net effect of the Circuit Court's straining to find and recognize collective rights is to completely ignore and eventually destroy the principal collective right which is affected in any way by this controversy.

Point C. The only "values" which the Circuit Court of Appeals held could be aggregated was "the value of the aggregate rights of all the members of the Nebraska Division to be allotted work while the alleged contracts (the collective agreements) continued. * * *" (R. 75). In other words, that court would permit aggregation but limit it to the value of the collective rights involved.

The statement of the court quoted above would seem to mean that the railroad was refusing to recognize that the Nebraska Division employees had any seniority rights whatever under the collective agreements. There was no controversy as to the existence of collective agreements or as to respondents' rights to be allotted work over C. & N. W. trackage, in accordance with seniority established by such agreements. None was alleged in respondents' petition or established by the undisputed evidence.

As seen before, no "collective rights" whatever were involved, since no seniority over interrailroad runs is given by such collective agreements. With no collective rights involved, there cannot be said to be a value involved as to such collective rights equal to the jurisdictional amount, whether aggregated or not. Each respondent's "collective right" in the controversy is nil, and its value, therefore, is necessarily zero.

Although there is no evidence whatever in the record as to the term or duration of any "right" to any run, the Circuit Court, after noting that the values of such rights were for "while the alleged contracts continued" (R. 75), also says that such value "for the life of the contracts will greatly exceed $3,000.00" (R. 75). *Section 6* of the Railway Labor Act, Section 156, Title 45, U. S. C. A. provides a means whereby, on thirty days' notice "of an intended change in agreements affecting rates of pay, rules or working conditions" such may be altered. The Nemitz affidavit (R. 39 to 45) established that the way in which these runs were divided was altered by such a means. It would seem that this alone should suffice to cause the continuance of any "right" in the respondents to have been terminated. At least, it shows that respondents have failed to show what was the life of the right which they claim to have had to the runs either prior to or subsequent to their reallotment, as testified to by Nemitz. It would therefore seem that the Circuit Court has supplied an essential element of fact in favor of the respondents concerning which there is no support in the record whatever, and which is a necessary part of that proof on which they have the burden.

With both courts (and also apparently the respondents) agreeing that no individual respondent has established the requisite jurisdictional amount, and with such a showing as to the only type of claim which the Circuit Court of Appeals holds can be aggregated, and no showing as to the duration or existence of even the very right on which respondents base their claims, it is apparent that respondents have failed to sustain the burden of proof as to jurisdiction. In *Kvos, Inc.* v. *Associated Press, supra,* this Court said:

> "The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. It did not operate merely as a demurrer, for

> it did not assume the truth of the bill's averments. * * * On the contrary the motion traversed the truth of the allegations as to the amount in controversy and in support of the denial recited facts dehors the complaint. * * * The motion required the trial court to inquire as to its jurisdiction before considering the merits, * * *. Where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof. * * * And in such inquiry complainant had the burden of proof."

Certainly, here, as in *McNutt* v. *General Motors Accept. Corp., supra,* the following applies:

> "It is the duty of the Court when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the Court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the Court to determine the question of jurisdiction upon the facts presented. * * *"

Conclusion.

It was not respondents' collective rights under the collective agreements which were involved. The only controversy was over the division of interrailroad runs which do not involve the seniority created by the collective agreements. The claims as to these interrailroad runs are separate and distinct to each respondent and adverse to others in their railroad Division, and no one respondent has any common or joint interest or title in the claim of any other respondent. A joint action to enforce such claims as they might have to the interrailroad runs is one as defined in Clause (3) of Rule 23 (a) of said Federal Rules of Civil Procedure, which is the "spurious" type, and as to which aggregation of

claims for jurisdictional purposes is not permissible. The District Court, therefore, correctly sustained these petitioners' motions to dismiss respondents' petition, and the Circuit Court of Appeals erred in reversing the judgment for these petitioners.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing such decision of said Circuit Court of Appeals.

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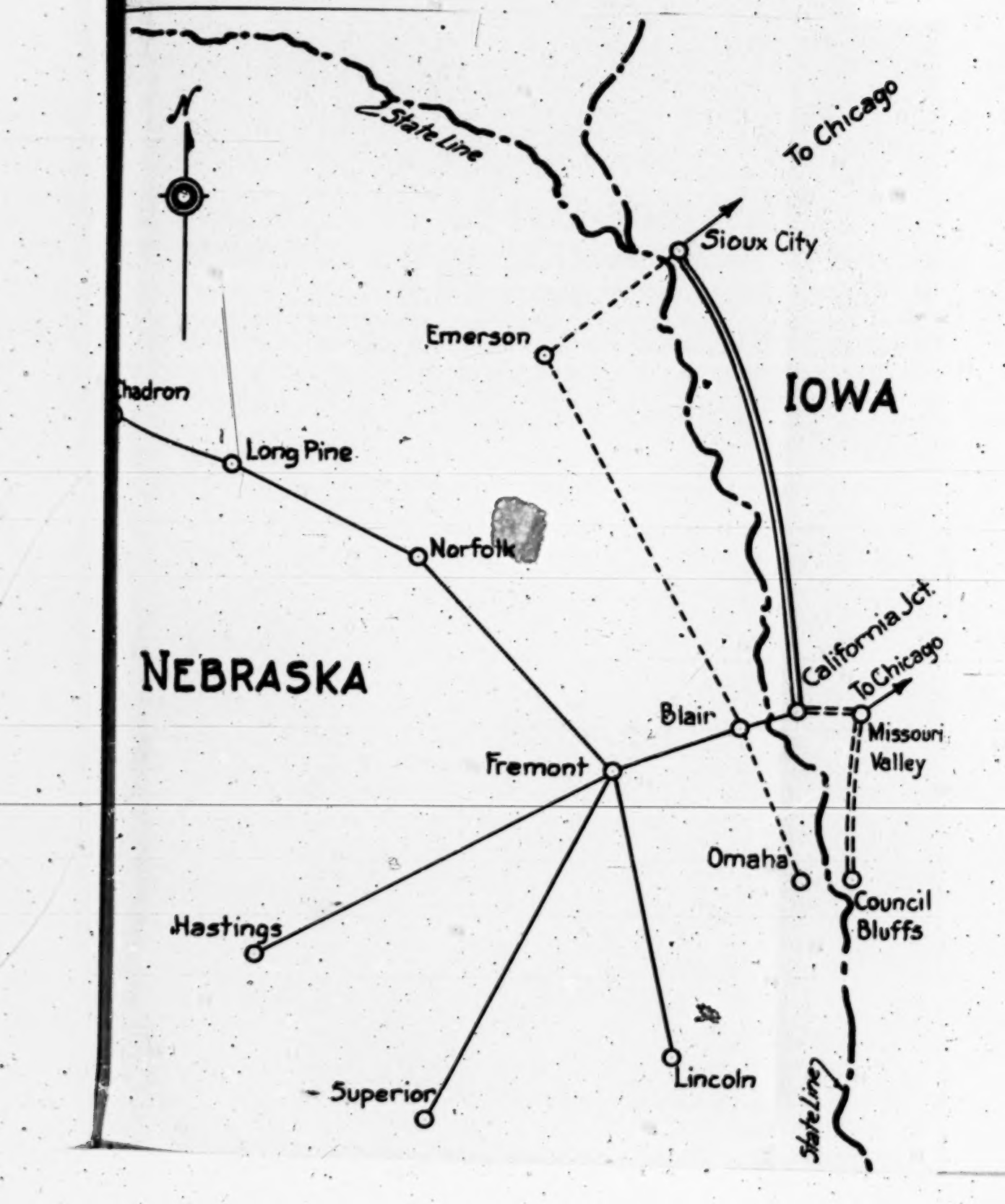
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IN THE

Supreme Court of the United States

October Term, 1941

No. 139

CHARLES M. THOMSON, Trustee for Property of Chicago & Northwestern Railway Company; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

vs.

BARNEY E. GASKILL, Et Al.,

Respondents.

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COURT RULES

LAW REVIEW ARTICLES

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(The references herein to pages of the printed transcript of the record are to the pages of the reprint thereof prepared by the Clerk of the Supreme Court.)

OPINIONS IN COURTS BELOW

The findings and judgment of the District Court are found at pages 51-3 of the Record. The opinion of the Eighth Circuit Court of Appeals (R. 62-6) is reported in 119 F. (2d) 105.

GROUNDS FOR INVOKING JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked pursuant to Section 240, Judicial Code as amended, Title 28, Section 347 (a), U. S. C. A., and on the grounds that the Eighth Circuit Court of Appeals' reversal of the District Court and finding that the District Court had jurisdiction of

the action was erroneous and in conflict with the decisions of this Honorable Court and those of Circuit Courts of Appeals other than the Eighth Circuit.

STATEMENT OF THE CASE

This was an action at law, brought in the United States District Court for the District of Nebraska, Omaha Division, by Barney E. Gaskill and forty other conductors and brakemen. All plaintiffs are employees of the Chicago & Northwestern Railway Company (hereinafter called "C. & N. W."), working on that physical piece of trackage which comprises the operating division of that railroad, which is now called the Nebraska Division. The defendants were Charles M. Thomson (substituted as Trustee after this action was begun), Trustee for the C. & N. W., and George Kimball, an employee of the C. & N. W. in its Sioux City Division, was "made a defendant here as a representative of said Division, for the reason that the members vary and the names are unknown, so that he may, if he so desires, represent said Sioux City Division of Railway Trainmen and Conductors" (R. 3-4). Kimball was not sued as a representative of the employees of the railroad operating the Sioux City Division (R. 3-4, Par. 7), but merely invited to represent the Sioux City Division of the Railway Brotherhoods as distinguished from the physical piece of railroad on which certain C. & N. W. employees work. Because of this, the District Court, on motion of C. & N. W. (R. 13), ordered the Railway Brotherhoods (Order of Railway Conductors and Brotherhood of Railroad Trainmen) to be made parties defendant (R. 14), and they came in and assumed positions adverse to said plaintiffs to defend the integrity of their agreements with the managements of the railroads.

The plaintiffs, who are now the respondents, sought separate and independent money judgments against their employer (R. 6-7), the C. & N. W., for damages individually to each of them (R. 6) resulting from the alleged failure to allot them work on certain interrailroad runs between Omaha, Nebraska, and Sioux City, Iowa, in accordance with alleged seniority on trackage between California Junction, Iowa, and Omaha, Nebraska, claimed under collective bargaining agreements between said employer and the two Railway Brotherhoods, demanding an accounting and that C. & N. W. "be compelled to recognize plaintiff's seniority right in said work by the Sioux City Division * * *" (R. 7). The terms of the existing schedules and agreements are not set forth in respondents' petition or in their affidavits.

Said defendants, who are now the petitioners, by motions to dismiss (R. 15, 17, 32, 33), challenged the allegations as to jurisdictional amount involved.

None of the exceptions in Section 24 of the Judicial Code, Section 41, Title 28, U. S. C. A., apply here. The District Court was therefore without jurisdiction if the requisite jurisdictional amount was not involved.

The District Court refused to proceed further until the jurisdictional questions were tried out, and required the parties to submit evidence thereon (R. 22). Ten of the respondents submitted affidavits (R. 23-32) which in substance merely reiterated the formal conclusions as alleged in their petition (R. 5). Both Brotherhoods and the C. & N. W. submitted affidavits (R. 35-51) which established the facts as hereinafter summarized.

The District Court found (R. 51-3) that (a) no individual respondent's claim involved the requisite jurisdic-

tional amount, and (b) that the nature of the action and of the rights involved were not such as to permit the respondents to aggregate their claims for jurisdictional purposes and dismissed the action and entered judgment for petitioners for costs (R. 53).

Respondents appealed to the Eighth Circuit Court of Appeals, which sustained the District Court as to (a) above, but reversed the lower Court as to (b), holding (1) that the alleged claims to seniority rights to the runs described in respondents' petition were collective rights sufficient to permit respondents to aggregate their claims therefor for jurisdictional purposes, and (2) that upon such aggregation, the requisite jurisdictional amount was involved (R. 61-6).

Petitioners filed a motion for rehearing in the Circuit Court of Appeals (R. 66) which was denied May 9, 1941 (R. 67). Upon motion of petitioners (R. 67) mandate was stayed (R. 69). Petition for writ of certiorari was filed in this Court by the petitioners June 6, 1941, docketed as No. 139, and granted by this Court on October 13, 1941 (R. 70).

The Circuit Court of Appeals, after agreeing with the District Court that the evidence showed no respondent's claim was sufficient to meet the jurisdictional requirements (R. 64), held:

> ". . . the issue on jurisdiction is the value of the right of the Nebraska Division of Trainmen to carry on through its members the work they claim the several contracts of the railroad have allotted to the Nebraska Division of Trainmen." (R. 64.)

and because this was (as the Court concluded), a "common and collective right" (R. 65), held it was proper

to aggregate all respondents' claims for jurisdictional purposes.

The position of these petitioners is that the record (R. 35-51) established that the several collective agreements respondents rely upon could not, and did not, purport to give any rights of any kind whatever to the runs described in respondents' petition; that the fact that the collective agreements may have created some common and collective rights, such as seniority limited to C. & N. W. runs over C. & N. W. Nebraska Division trackage, does not serve to make other rights and claims to work on interrailroad runs, as to which there is no seniority in any employee, and which are not based on and do not spring from such collective agreements, common and collective rights, so as to provide an excuse for aggregation of respondents' claims for jurisdictional purposes; that the respondents' claims to said interrailroad runs are not based on and have no connection whatever with seniority, and the record fails to disclose facts sufficient to entitle the Federal Court to find jurisdiction for itself by aggregating respondents' claims, or otherwise.

The controlling facts relative to the jurisdictional question are established by the affidavits filed by petitioners (R. 35-51) and not controverted by respondents save by formal conclusions, and may be summarized as follows:

(See Plat, Appendix to Brief)

C. & N. W., so far as this case is concerned, owns, operates and manages lines of railroad in Nebraska, including one from Fremont, Nebraska, eastward to Blair, Nebraska, where it crosses the tracks of Chicago, St. Paul, Minneapolis & Omaha Railway Company (hereinaf-

ter called "C. St. P. M. & O."), and on across the Missouri River to California Junction, Iowa, and thence northerly on the east side of the Missouri River to Sioux City, Iowa. For operating purposes, the C. & N. W. is separated into (1) the Sioux City Division, which is the trackage of the C. & N. W. alone from Sioux City, Iowa, to California Junction, Iowa, and (2) the Nebraska Division, which is the trackage of the C. & N. W. alone from California Junction, Iowa, west across the river to Blair, Nebraska, and on to Fremont, Nebraska, and points west.

C. St. P. M. & O., separate and apart from the C. & N. W., owns, operates and manages a line of railroad from Omaha, Nebraska, northward to Blair, Nebraska (where it crosses the C. & N. W. east and west line above referred to) and on northward to Sioux City, Iowa, all on the west side of the Missouri River until it crosses that river opposite Sioux City.

Because of heavy grades and many curves over the C. St. P. M. & O. north of Blair and west of the Missouri River, the managements of said two railroads have for over six years operated trains primarily carrying C. St. P. M. & O. freight, between Omaha and Sioux City, running on the following trackage, to-wit, between Omaha and Blair on the C. St. P. M. & O. tracks, and from Blair across the river to California Junction on C. & N. W. tracks, and thence north to Sioux City on the east side of the river on C. & N. W. tracks. These runs are the runs described in respondents' petition (R. 4) as now being sought by respondents as employees of the Nebraska Division of C. & N. W. because of alleged seniority held by virtue of collective agreements with the C. & N. W. But they are interrailroad runs and not merely interdivisional runs of the C. & N. W. (R. 47).

As herein used, the term "interdivisional run" means a run upon the tracks of the same employer covering a part of two operating divisions of that same railroad, i. e., from Blair, Nebraska, on the C. & N. W. tracks in the Nebraska operating division to California Junction, Iowa, thence northerly on the C. & N. W. tracks to Sioux City in the Sioux City operating division, or vice versa. An "interrailroad run" merely means a train operated by the same crew over the tracks of two separate railroads, i. e., from Omaha, Nebraska, to Blair, Nebraska, over the C. St. P. M. & O. and thence either east over the C. & N. W. tracks to California Junction, or west over C. & N. W. tracks to Fremont, Nebraska (R. 47).

In this case, the seniority districts of the C. & N. W. employees correspond to the operating divisions made and designated by the C. & N. W., i. e., the Sioux City Division of that railroad is coextensive with the C. & N. W. Sioux City Division seniority district, and the Nebraska division of that railroad is coextensive with the C. & N. W. Nebraska Division seniority district (R. 44-5).

Seven and one-half miles of the said interrailroad runs described in respondents' petition are between Blair, Nebraska, and California Junction and over the C. & N. W. tracks and within the C. & N. W. Nebraska operating division, and hence within the C. & N. W. Nebraska seniority district. Approximately twenty-three miles are between Blair and Omaha, Nebraska, and over C. St. P. M. & O. tracks and not in any C. & N. W. seniority district (R. 45-6). The balance of the runs described in respondents' complaint are between California Junction, Iowa, and Sioux City, Iowa, are over C. & N. W. tracks, and (except between California Junction and Missouri

Valley, a distance of a little over a mile, which is neutral territory) are within the C. & N. W. Sioux City operating division, and hence within the C. & N. W. Sioux City seniority district.

Each of the said two railroads has its own collective agreements with the said Brotherhoods. Neither the C. St. P. M. & O., nor any of its employees, are parties to this action, but only C. St. P. M. & O. employees have any seniority on the 23 miles of C. St. P. M. & O. track between Blair and Omaha, Nebraska (R. 45-6).

These collective agreements are the sole source of any seniority rights in the employees of the respective employers. Such seniority rights are limited absolutely to a seniority district which is a definitely defined portion of the tracks of that particular employer. No railroad employee has any seniority on more than one railroad at a time, and this is confined to runs of his employer over his employer's tracks and only on a particular portion of those tracks as above stated. (See also paragraph 5 of respondents' petition, R. 2-3). Although the employer is interested therein and his employees and tracks are part of those used, an interrailroad run is not a run of the employer, is not confined to the employer's tracks, is not within any employee's seniority district, and no rights thereto are created by the collective agreements between the employer and its employees (R. 46-7).

The allocation of interrailroad runs described in respondents' complaint do not arise by virtue of seniority or any agreements as to seniority, but solely by virtue of the agreement referred to in paragraph (12) of respondents' petition (R. 5). This agreement consisted of decisions made by each of the two Brotherhoods in their

own forums on a long-standing dispute *between employees* of two different railroads, and not in regard to any seniority created by collective agreements. These decisions were approved and adhered to by the respective railroads in dividing the work on these interrailroad runs between the C. & N. W. Sioux City Division employees and the C. St. P. M. & O. employees on the basis of the proportion which the miles of track of each railroad over which the runs were operated bore to the total miles of track involved in said runs.

This allocation did not affect the relations between C. & N. W. Nebraska Division employees and the C. & N. W. Sioux City Division employees, except that these interrailroad runs were not only over tracks in the Sioux City C. & N. W. Division and over tracks of the C. St. P. M. & O., but also over seven and one-half miles of track between Blair and California Junction which were within the C. & N. W. Nebraska operating division. But that seven and one-half miles of track was continued open to all C. & N. W. Nebraska Division employees in handling trains originating upon or destined to the C. & N. W. Nebraska operating division.

Respondents' Petition does not allege that their seniority rights over said seven and one-half miles of track between Blair and California Junction have been invaded or denied, or that C. & N. W. or the Railroad Brotherhoods or George Kimball as a representative of anyone failed or neglected to give respondents recognition for any part of runs on C. & N. W. tracks which did, in fact, constitute C. & N. W. divisional or interdivisional runs, or their proper percentage thereof based upon the mileage on the C. & N. W. tracks in the Nebraska operating divi-

sion (R. 3-4). Respondents predicated their alleged right, which they claimed had been denied, not upon the seven and one-half miles of track between Blair, Nebraska, and California Junction, which was within their seniority district without dispute, but sought to include within their alleged seniority district the twenty-three miles of trackage of the separate railroad, the C. St. P. M. & O. between Blair, Nebraska, and Omaha, Nebraska, and to have the said interrailroad runs considered as interdivisional runs of the C. & N. W. rather than interrailroad runs of C. St. P. M. & O. and the C. & N. W.

The Circuit Court of Appeals asserted that the value of respondents' rights, which that Court thought were collective rights, were for "while the alleged contracts continue" (R. 64), and said that such value "for the life of the contracts will greatly exceed $3,000.00" (R. 64). There is nothing in the record to show the life of such contracts, but the Nemitz affidavit (R. 35-42) established that (1) the division of work on the said runs has been changed on several occasions, (2) the route of the runs can be and has been changed and the railroad lines are such as to permit the runs to be routed wholly on either railroad line to the complete exclusion of the other railroad and its employees, and (3) as previously pointed out, that no employee of either railroad has any rights, which are created by or which spring from said collective agreements, to any portion of the runs described in respondents' petition.

After petitioners' evidence was submitted in the District Court, that Court gave the respondents a further opportunity to rebut the same or to produce other evidence, but respondents refused to do so and elected to

stand on the single proposition that they were entitled to aggregate their claims for jurisdictional purposes (R. 51-3). (Also see respondents' Statement of Points intended to be relied upon) (R. 55-6.)

ASSIGNED ERRORS INTENDED TO BE URGED

The Circuit Court of Appeals erred as follows:

1. In holding the District Court had jurisdiction, and in failing to sustain the District Court's dismissal of the case for want of jurisdiction.

2. In holding that respondents, as a class or otherwise, were entitled to aggregate their claims for jurisdictional purposes.

3. In holding that respondents' claims to the runs described in their petition arose out of seniority or other rights created by C. & N. W. collective agreements with the representatives of its employees so that the value of such common or collective rights could be aggregated for jurisdictional purposes.

4. In holding that respondents' petition asserted any claims, the aggregate value of which were at least equal to the requisite jurisdictional amount, which lawfully could be aggregated for jurisdictional purposes.

5. In holding that respondents had sustained the burden of proof to establish jurisdiction in the Federal Court, after their jurisdictional allegations were appropriately challenged.

ARGUMENT

Summary of Argument

A. Only in a true class action, such as defined in Clause (1) of Rule 23 (a) of the Rules of Civil Procedure, is aggregation of claims permissible for jurisdictional purposes. Such aggregation is not permissible in "hybrid" or "spurious" class actions, as referred to respectively in Clauses (2) and (3) of said Rule 23 (a). Respondents' action, if a class action at all, is of the "spurious" type in which such aggregation is not permissible.

B. Respondents' petition asserts no claims on common or collective rights. Respondents made no effort to controvert petitioners' evidence that railroad collective agreements give seniority only to runs of the employer over the employer's tracks, and the greater part of the seniority trackage claimed by respondents is C. St. P. M. & O. trackage and that the runs claimed by respondents are interrailroad runs as to which no employee has any seniority or right under or pursuant to the collective agreements. Since respondents' collective rights are not involved or disputed, they can afford no basis for permitting the aggregation of other claims for jurisdictional purposes.

C. Respondents failed to sustain the burden to establish the Court's jurisdiction after the alleged conclusions in their petition were properly challenged.

A

Both the District Court (R. 51-3) and the Circuit Court of Appeals (R. 64) held all respondents had failed to establish an individual claim for as much as $3,000.00, and, in effect, this was admitted by respondents' State-

ment of Points on Appeal (R. 55-6), and was admitted by respondents on the first page of their response to the petition for the writ of certiorari. (The evidence showed that after disregarding many factors which would make respondents refuse to accept such work and make it impossible for them to work that often, and many other contingencies beyond the control of any employee, still the maximum the highest paid respondent could make on the only part of the runs within his seniority district (Blair to California Junction) working a round trip every day, over a period of six years, would aggregate only $2,299.50 (R. 48). The Nebraska statute of limitations is five years for written contracts and four years for oral contracts (Sections 20-205, 20-206, Nebraska Compiled Statutes, 1929, as amended. Statutes, see Appendix.)

The sole question involved, therefore, is whether the action and the rights therein asserted are such as to permit the aggregation of claims for jurisdictional purposes.

In the lower courts respondents appeared to confuse their right to consolidate their various individual causes of action into one suit, as permitted even as to the type of suits referred to in Clause (3) of Rule 23 (a) of the Rules of Civil Procedure (28 U. S. C. A., following Section 723 (c)), with the rights and privileges of plaintiffs in "true" class actions such as referred to in Clause (1) of said Rule 23 (a). Respondents' right to join in one suit is not attacked. Petitioners merely contend that such bare right of joinder does not carry with it the right to have the joint suit treated as a true class action, and that such was not intended by Rule 23 (a).

Rule 23 is but a substantial restatement of Equity Rule 38 as construed at the time Rule 23 was adopted.

The notes to Rule 23 refer to Professor Lesar's article entitled "Class Suits and the Federal Rules," 22 Minn. Law Review 34, for a general analysis of class actions and the requisites of jurisdiction.

Adopting Professor Lesar's nomenclature, such "class suits" are intended by Rule 23 to fall into three distinct classes, as follows:

(1) *True class actions.* Such is the type referred to in Clause (1) of Rule 23 (a) and is one where the various parties are not only a class similarly situated, but each one has a common interest or title in the recovery sought. *Gibbs v. Buck,* 307 U. S. 66, 83 L. Ed. 1111, which involved the American Society of Composers and Publishers' practices and a state statute in regard thereto, was such a true class action; and hence one or more of such parties could bring a class action for themselves and for all others in the class, and because of the common interest or title could aggregate their claims in order to establish the jurisdictional amount.

(2) *Hybrid class actions.* Such is the type referred to in Clause (2) of Rule 23 (a) and is an action where one or more parties are so situated as to permit one party to bring a class action for himself and others similarly situated, but there is not such a common interest or title as to permit all to aggregate their claims in order to establish the jurisdictional amount. The United States Supreme Court in effect has said that *Clark v. Gray,* 306 U. S. 583, 83 L. Ed. 1001, was such an action. There the action was brought by a few for all in the class who were adversely affected by a California statute, but certainly none had any common interest or title in the re-

covery of any other plaintiff, as was on the same day held to be the case in *Gibbs v. Buck,* supra.

(3) *Spurious class actions.* As Professor Lesar says, these are "the third type of actions provided for in subsection (3) (a) of Rule 23, (where) the only community of interest is in questions of law or fact." In this third type, while the parties are permitted to join in bringing one action, each plaintiff has a separate and distinct right, and each must have, and if challenged prove, the jurisdictional requisites.

Respondents did not sue as a class, sought no relief and asserted no claims for themselves or on behalf of others as a class. Respondents' petition and the entire record made by them show only individual claims to be involved. The individual and personal nature of each Respondent's cause of action, as distinguished from any assertion of common, collective or class rights, is clearly shown by such allegations as (a) in Par. 13 of their petition (R. 5) as to damage, "to each of said plaintiffs herein," (b) in Par. 17 (R. 6), damages "that each have sustained," and (c) in the prayer (R. 6) seeking judgments "in favor of each individual plaintiff for the amount due him."

Other than as to their "collective rights," on which the Circuit Court of Appeals relied so heavily, and which will be subsequently discussed, there are no claims asserted in which the respondents claim any common interest or title. The only community of interest is in the questions of law or fact affecting their several rights, some of which, but not all, are common, and, in the similar relief which each respondent seeks. Such an action, if

a class action at all, is only one of the "spurious" type covered by Clause (3) of Rule 23 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States, Title 28, following Sec. 723 (c), U. S. C. A.

As Judge Clark of the Second Circuit Court of Appeals said in *Hackner v. Guaranty Trust Co.*, 117 F. (2d) 95:

> "The interests of all are in common and involve a common question of law and fact. The prayer for relief was for an accounting, damage for the loss sustained by all note-holders. * * * The sole question is whether or not the amount in controversy exceeds, exclusive of interest and costs, $3,000.00 * * * Aggregating to make up the jurisdictional amount is permitted only when the claims are of a joint nature, as when it is sought to enforce a single title in which the plaintiffs have a common interest. * * * A class could be found only in the 'spurious' sense (See 2 Moore's Fed. Practice, 2241), that a common question of law and fact was involved. Among parties so related aggregation is improper. * * *"

The Eighth Circuit Court of Appeals, in holding that this case was controlled by *Gibbs v. Buck*, supra, seems to have erroneously assumed (1) that the respondents were all the conductors and brakemen working for the C. & N. W. in its Nebraska Division and that all had a common interest in this litigation. (The Court says (R. 65) the plaintiffs "constitute the class"). And (2) that the particular operating division of that railroad was analogous to ASCAP in the *Gibbs v. Buck* case.

That there are conductors and brakemen, other than the respondents, working in said operating division with higher seniority rank, is shown by the seniority numbers listed in respondents' affidavits (R. 23-32). It necessarily

follows that others in that Division having greater seniority than these respondents, and hence having attractive runs over C. & N. W. trackage secure from encroachment by employees of other railroads, are not interested in or desirous of having the respondents succeed in litigation, which might permit the employees of another railroad to assert seniority rights over C. & N. W. trackage.

Thus while the Circuit Court of Appeals attempts to treat the respondents as being the class and defines that class as including all C. & N. W. employees working on the Nebraska Division of that railroad, it is evident there is not even a common question of fact as between the rights and interests of the other employees on the C. & N. W. Nebraska Division and the respondents. See *Hansberry v. Lee,* 311 U. S. 32, 85 L. Ed. 11.

The Division involved is not the local subdivision of the Brotherhoods, but the operating division of the railroad which, unlike ASCAP, is a piece of railroad track and, unlike ASCAP, is not an organization of the employees working therein, having officers, activities or functions. This is a completely different situation from ASCAP, which as an organization and as the holder of limited assignments from its members of copyrights, collected large sums of money to which the ASCAP members had a common interest and title and such ASCAP members were entitled to "share in the earnings through mandatory distribution under the articles of association and not by way of dividends. . . ." *Gibbs v. Buck, supra.* This Railroad Division is not an organization at all and neither collects nor distributes moneys for any employee. None of those working on this trackage have any common

interest or title in what any other employee receives, and none is asserted. The only relation of respondents to this Division is that they work therein and their seniority rights are confined thereto.

The respondents are merely a part of a group working for the same employer in the same State and under the same form of employment agreement. In seeking a common immunity from an alleged restriction on their means of earning a livelihood, they are in exactly the same situation as the plaintiffs in *Clark v. Gray, supra,* in that "there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit," and hence whose "only community of interest is in questions of law or fact." In such a situation, the rule of *Clark v. Gray, supra,* as it is now being applied by the other Circuit Courts of Appeals in *Central Mexico Light & Power Co. v. Munch,* 116 F. (2d) 85; *Hackner v. Guaranty Trust Co., supra,* and *Atwood v. National Bank of Lima,* 115 F. (2d) 861, is the correct rule. See also, *"Class Suits and the Federal Rules,"* by Prof. Lesar, 22 Minn. Law Review, 34; *Kvos, Inc. v. Associated Press,* 299 U. S. 269, 81 L. Ed. 183; *McNutt v. General Motors Accept. Corp.,* 298 U. S. 178, 80 L. Ed. 1135; *Stucker v. Roselle,* 37 F. Supp. 864; *Milk Wagon Drivers Union of Chicago, etc., et al. v. Associated Milk Dealers, et al.,* 39 F. Supp. 671.

Atwood, et al. v. National Bank of Lima, 115 F. (2d) 861, decided by the Sixth Circuit Court of Appeals on December 3, 1940, involved an action by a number of plaintiffs, all having claims as beneficiaries of the same trust, who, upon their concept of the suit being a class action, merely alleged that the amount in controversy ex-

ceeded $3,000.00, and made no allegation as to what they were separately entitled to recover. The Court held the claims could not be aggregated for jurisdictional purposes, and hence remanded the case to permit amendments to the pleadings to enable the plaintiffs individually to show the jurisdictional amount.

In the present case, the respondents did plead a conclusion as to each of their claims being of the requisite amount, but, after proper traversement of such conclusion, the trial Court did what the appellate Court directed to be done in the *Atwood* case, namely, gave each plaintiff every opportunity to establish that his claim would be as much as the required amount. All respondents failed completely to make any such showing. Indeed they abandoned the attempt (R. 52, 55-6).

Respondents' brief on appeal to the Circuit Court (which was filed in this Court with respondents' response to the petition for certiorari) says, at page 54:

> "But where these interests are distinct, and they are joined for the sake of convenience only because they form a class of parties whose rights or liabilities arose out of the same transaction, or have a relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated."

The same proposition was stated in *Clark v. Gray, supra,* as follows:

> "* * * It is plain that this allegation (alleging generally that the amount involved exceeded $3000.00) is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit. * * * There is a similar rule that when sev-

> eral plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount to be within the jurisdiction of the District Court, and that those amounts cannot be added together to satisfy jurisdictional requirements."

Respondents are in the position of having failed to plead a class action in any fashion whatever, having refused to offer any proof that they belong to or claimed to have any right to sue as a class, having failed to seek relief for themselves or anyone else as a class, and having specifically confined their claims to "separate and distinct" demands for individual money judgments. Surely then, respondents have no rights under Rule 23 other than those given to "spurious" class actions. On page 24 of respondents' said brief as filed in the Circuit Court of Appeals it is recognized that this action belongs in this "spurious" classification.

If the respondents' claims have any merit whatever they merely serve to make them creditors of C. & N. W. and as such they cannot aggregate their claims for jurisdictional purposes. *Hilliker v. Grand Lodge*, 112 F. (2d) 382. There can be no question but that the jurisdictional allegations were properly and sufficiently traversed (R. 14-16, 17-22, 33-5), or that the absence of jurisdiction in the Federal Court is at all times before the Court. *Kvos, Inc. v. Associated Press*; 299 U. S. 269, 81 L. Ed. 183; *McNutt v. General Motors Accept. Corp., supra; Town of Lantana, Florida, v. Hopper*, 102 F. (2d) 118.

B

At this point it should be helpful to note that, contrary to the inference which respondents sought to give, the 1930 change in railroad operation was not a change

in any employee's seniority rights, but merely a change in the route over which the traffic was handled (R. 40-1, 46-8). This served to decrease the use of C. & N. W. trackage, but practically none of this trackage was in respondents' seniority district (R. 46-7).

As shown by the attached plat and petitioners' affidavits (R. 35-51), the routing of the runs prior to 1930 was from Omaha, Nebraska, directly across the Missouri River on the Illinois Central Railroad bridge to Council Bluffs, Iowa, thence to Missouri Valley, Iowa, and on northward to Sioux City, all on C. & N. W. tracks, but not on trackage within the C. & N. W. Nebraska Division. Prior to August 1, 1926, C. St. P. M. & O. employees had rendered a part of this service, although they had no seniority whatever over any of the tracks then involved. They objected to losing this work after August 1, 1926, and it was the result of this controversy that on May 1, 1930, the runs were again rerouted so as to be as at present, and work was restored to the C. St. P. M. & O. employees on the basis of their trackage as now being utilized. The allocation of runs in this pooled operation as made by the Brotherhoods and the railroads in 1930 (R. 40-1, 46-8) could not have served to change anyone's seniority, since it gave work or credit for work over tracks of a railroad other than the railroad on which the recipient had any seniority at all. Hence, neither the rerouting of the traffic by the two railroads nor the resulting allocation of runs as agreed to by the railroads and Brotherhoods had anything to do with seniority.

Geo. T. Ross Lodge No. 831, et al. v. B. R. T., 191 Minn. 373, 254 N. W. 590, was a case where separate operations of two railroads were combined into a pooled

single operation, as in the present case, and the operation thereafter was jointly conducted by the two railroads, and certain employees of one railroad were complaining that their seniority rights had been infringed by an agreement between the railroads and the Brotherhoods as to the division of the work between the employees of the two railroads.

The following quotations are taken from that opinion:

"The railway companies involved operate under so-called schedules or contracts not made with the individual men but negotiated by the Brotherhoods under their practice and constitution with the railroads severally. These schedules are the result of collective bargaining. All railway employees have the benefit of these schedules whether they belong to the Brotherhoods or not."

"A railway company must be conceded the right to make such contracts with another company in respect to some joint use of tracks and transportation facilities as it deems desirable, provided there is no violation of a statute or of the contract rights of its employees. The pooling agreement is admittedly valid, approved as it was by the Interstate Commerce Commission. * * * The men of each railway were given as nearly as possible the same amount of work in handling the ore transportations as they had before the pooling agreement."

"There is ample support for this finding not only from a consideration of the provisions of the schedule of June 1, 1924, but also in the testimony of the highest Brotherhood officials who had spent many years in the service passing upon disputes relative to seniority rights and construing contracts between railway companies and their employees. Indeed, some of these witnesses were persons whose

duty was to promulgate rules or decisions governing seniority rights."

* * * * *

"Schedules or contracts governing the rights of railway employees as to wages, seniority and working conditions are obtained through the instrumentality of Railroad Brotherhoods by the method of collective bargaining and are enforced by the Courts. George v. Chicago, Rock Island & Pacific Ry. Co., 183 Minn. 610, 235 N. W. 673, 237 N. W. 876. All employees obtain the benefit thereof whether they belong to an affiliated lodge or not. Of course, nonmembers can stand in no better position than the members. * * * But a Brotherhood's interpretation of schedules, procured through the efforts of the organization, and its determination of a controversy according to its constitution and practice, should mean much to the courts. * * * There can be no doubt that not only the defendant Brotherhood but the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Locomotive Engineers have made a final decision that no violation of plaintiffs' seniority rights under the schedule of June 1, 1924, will result from the two railway companies putting into effect the modification of the pooling agreement by the substitution of Exhibit A in place of paragraph 6 of article III thereof. To hold that plaintiffs are not concluded by the decision of the Brotherhoods seems to us destructive of the power of the organization to compose disputes between employer and employees, and to weaken the efficacy of collective bargaining deemed so essential to the success of labor organizations. * * *"

The basis of the Circuit Court of Appeals' conclusion that respondents' claims could be aggregated for jurisdictional purposes was that such claims were for "the value of the right of the Nebraska Division of Trainmen to carry on through its members the work they claim

the several contracts of the railroad have allotted to the Nebraska Division of Trainmen. (R. 64). * * * The common and collective right of the conductors and trainmen to recognition by the railroad is analogous (to those of ASCAP members) * * * The aggregate value of the work claimed by the class is, therefore, the criterion for jurisdiction" (R. 65).

Petitioners contend the Circuit Court of Appeals is wrong as to (1) the class involved, (2) the nature and source of the rights involved, (3) the contracts involved, (4) the controversy involved, and (5) the value involved.

If any "class" is involved, it is certain that respondents do not constitute the Nebraska Division of Trainmen. The Circuit Court of Appeals does not specify whether by the "Nebraska Division of Trainmen" it means all those employed by C. & N. W. in its Nebraska operating division or those belonging to the local lodges or "divisions" of the respective Brotherhoods. The Court could have meant either, but apparently did not make any distinction between the two. The respondents do not constitute all the members of either class and do not sue as members of either such "class" and assert no rights as being inherent to them by virtue of membership in either. To the contrary, the respondents seek separate and independent money judgments against their employer, the C. & N. W., allege the existence of no class whatever, seek no relief, and assert no claims for themselves or on behalf of others as a class. The individual and personal nature of each respondent's cause of action as distinguished from any assertion of class rights is clearly shown by the allegations in their petition hereinbefore referred to. Even the affidavits filed by the respondents

(R. 23-32) definitely show an intention to sue for the individual damages suffered by each individual on his own personal rights as claimed. Therefore, contrary to the Circuit Court of Appeals' statement that "the prohibition against doing the work is against the class and the plaintiffs constitute the class" (R. 65), the petitioners assert that the respondents are not that class at all.

In any event, however, respondents' petition (R. 1-7) and petitioner's evidence (R. 35-51) clearly established that respondents' rights, interests and claims are not common and are not even in harmony with those of others in the class, whichever group the Circuit Court of Appeals or respondents' petition may have intended to refer to. Other employees in either of such classes, because of having greater seniority than respondents and hence working C. & N. W. runs with which they are satisfied, or for other reasons, have no interest in (1) seeing fellow employees in the Sioux City Division being required to grant mileage percentage twice for operating over the same stretch of track, or (2) seeing employees of another railroad denied mileage percentage for that part of interrailroad runs handling freight of their railroad over their railroad's tracks, or (3) in having all the fruits of railroad collective bargaining thrown into utter chaos by any doctrine that one railroad's agreement can somehow create seniority in its employees on the tracks of another railroad, or such chaos as would result if some right to seniority to interrailroad runs was created in employees of every seniority district by the fact that such interrailroad runs operated for any distance over tracks within such seniority districts, or (4) in having the decisions of the forums of their own collective bargaining agents be flouted and disregarded. Such matters, and possibly

many others, serve to make the interests of most of those composing the "Nebraska Division of Trainmen" and of their own collective agents, directly and completely adverse to the claimed rights of the respondents. As this Court said in *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 11, "It is quite another (matter) to hold that all those who are free alternatively to assert rights or to challenge them are of a single class . . . ."

This situation, in part, accounts for the willingness of the two Brotherhoods to be brought into this litigation, and for the position they have assumed therein. The very integrity, workability and benefits of their collective agreements with the railroads are threatened by respondents' claims. The respondents have sought to reap the benefits of collective bargaining and avoid all of its responsibilities and limitations which apply equally to them and which have been assumed by all in the class but them. Manifestly, this is union labor heresy. If successful, such a theory would eventually dissipate all that has been accomplished in over seventy-five years by railroad collective bargaining.

A consideration of the powers of collective agents to bind all in the bargaining unit, and the effect of changes in the agreements on the employer's obligations to its employees, probably goes more to a portion of the merits than is justified by the questions now before this Court. But at least respondents cannot in this action conjure up a true class action by attempting to allege any such heretical theory. Further, such a question clearly would grow out of the rules and laws of the collective agents' organizations and the inherent powers of collective agents in general, but not out of the particular agreements referred to in respondents' petition.

Further, the Circuit Court of Appeals was mistaken as to the rights and as to the contracts involved. No seniority rights whatever are involved, and hence the only contracts which create such rights are not involved.

Railroad seniority means age in service. It is confined to railroad operating divisions, i. e., a list of the conductors for the Sioux City Division of C. & N. W. is the seniority list for that division. No. 1 on that seniority list is the name of the man who has the oldest date of beginning service as a conductor on the C. & N. W. on that division, not on the railroad, and No. 2 has the next to oldest date of beginning service on the C. & N. W. as a conductor on that division. (See par. 5 of respondents' petition, R. 2-3.)

Seniority gives the oldest man in service certain rights, for example, the privilege of selecting the run he prefers on the division on which he has seniority. So the conductor having the greatest seniority among those respondents on the C. & N. W. Nebraska Division being No. 57 (R. 23-32), there are 56 other conductors who have seniority over all respondents to any C. & N. W. Nebraska Division run.

The seniority lists or schedules merely provide for purely personal wages and working conditions for each employee, if and when he is an employee and does work. They in no way bind the employer to establish or continue work or runs in order for those listed on the schedules to have something to which such schedules could be applied. The agreements providing for the schedules were obtained by collective bargaining, but do not insure work. It is only when and if work is available, which is subject to a schedule on which a particular man may be listed,

that any collective right or senority thereto arises, and even then the schedules are solely for the purpose of determining, not joint, but conflicting claims between the men working in the same division of the same employer.

An individual can only have seniority on one division of a railroad at a time, and on only one railroad (R. 45-7). If he quits working on the division on which he has seniority and goes on another division, even on that same railroad, he loses all his seniority rights, except that he gets new seniority from the date he begins working on the other division (R. 2-3).

Petitioner's evidence (R. 35-51) is uncontroverted that railroad collective agreements in general, and those here in particular, are the sole source of all seniority rights. The C. & N. W. employees have a collective agreement with the C. & N. W., and the C. St. P. M. & O. employees have another and separate agreement, not with the C. & N. W., but with the C. St. P. M. & O. These separate agreements each create seniority only on runs of the employer over the employer's tracks, and only over such of those tracks as are within the employee's seniority district (R. 3-4), and hence could not create any seniority as to an interrailroad run. (See *"Seniority Rights Under Labor Union Working Agreements"* by Prof. Christenson, 11 Temple Law Quarterly, 355.)

The Court said, in *Shaup v. Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327:

> "The seniority rights of complainants were by virtue of agreement between the Brotherhood and the Railroad Company * * *"

In *Ryan v. New York Central*, 267 Mich. 202, 255 N. W. 365, it was said:

> "He (the employee) has no inherent right to seniority in service, nor did such right arise out of his employment by the Railroad Company, except as provided for in the contracts entered into and the rules adopted by the Company relating thereto."

There is no dispute but that all the seniority which exists here belongs to (1) C. & N. W. Sioux City Division employees for C. & N. W. runs on C. & N. W. tracks between Sioux City, Iowa, and California Junction, Iowa, (2) C. St. P. M. & O. employees for runs of their employer on its tracks between Omaha, Nebraska, and Blair, Nebraska, and (3) C. & N. W. Nebraska Division employees for C. & N. W. runs on the remaining portion of the trackage involved as described in respondents' petition, which is the seven and one-half miles of C. & N. W. tracks between Blair, Nebraska, and California Junction, Iowa.

If the runs described in respondent's petition had been broken down into three separate runs, each by the employers respectively owning the three separate sections of track, and beginning and ending, respectively, where such ownership begins and ends, then, without dispute, respondents would have certain superior rights, at least over C. & N. W. Sioux City Division employees, and over C. St. P. M. & O. employees as to said seven and one-half mile run (Blair to California Junction) and such would result from their seniority rights created by the collective agreements. However, that is not the run which the respondents have described in their petition. They describe and claim an interrailroad run over all three sections of track. Naturally, such a breaking down of runs as above suggested would not be a feasible opera-

tion for the railroads. Further, it would be resisted by the employees, as none of the portions of the runs then would be attractive to the employees, because of the limited mileage which could be worked per day, and these employees are paid by the mile (R. 41, 48).

But respondents seek both to ignore the fact that the runs they described were interrailroad runs, and hence no employee has any right thereto by virtue of seniority created by the collective agreements, and also to assert that they have seniority to the twenty-three mile portion of the runs over C. St. P. M. & O. tracks between Omaha and Blair, Nebraska (R. 4). The Circuit Court of Appeals apparently adopted this unsupported allegation, notwithstanding sworn proof to the contrary (R. 35-51) which the respondents did not attempt to contravert, save by reiterating the formal conclusions of their petition.

Thus it is clear that the real controversy is not, as stated by the Circuit Court of Appeals, over "the right * * * to carry on * * * the work they claim the several contracts of the railroad have allotted * * *" (R. 64). The agreement (interrailroad) referred to in Paragraphs 10 and 12 of respondents' petition (R. 4, 5) is what the controversy is about, and it has nothing whatever to do with the collective agreements creating seniority. This was an interrailroad arrangement for interrailroad runs and allotting the work thereon in accordance with the decisions of the forums of the Brotherhoods. These particular respondents, as distinguished from the other C. & N. W. employees in the C. & N. W. Nebraska Division, and all other C. & N. W. employees, were dissatisfied because, although a few miles of track in the C. & N. W. Nebraska operating division (Blair to California Junction) were utilized for the interrailroad runs, the work was divided

between the Sioux City Division of C. & N. W. employees, whose trackage comprised more than one-half of the total trackage in the runs, and the C. St. P. M. & O. employees whose work was confined to the proper percentage based on the miles of C. St. P. M. & O. trackage used for the runs. Such a controversy involved no seniority question whatever and the collective agreements do not purport to give any rights which could be violated or denied regardless of how that controversy was determined.

The settlement of that controversy did not affect the relations between C. & N. W. Nebraska Division employees and the C. & N. W. Sioux City Division employees. The seven and one-half miles' stretch of track between Blair and California Junction was continued open to all C. & N. W. Nebraska Division employees in handling trains originating upon or destined to the Nebraska Division of the C. & N. W., and when in any other way so utilized in work to which the employees of said Division had any seniority rights. Respondents' petition does not allege that their seniority rights over said seven and one-half miles of trackage have been invaded or that any of the petitioners failed or neglected to give respondents recognition for any part of C. & N. W. runs on C. & N. W. tracks which did in fact constitute C. & N. W. divisional or interdivisional runs, or their proper percentage thereof based upon mileage (R. 4, 5).

To the contrary, respondents, after alleging certain conclusions as to seniority, which were disproved without any attempt by the respondents in rebuttal, sought to compel the C. & N. W. and its employees in the Sioux City Division to grant rights to a mileage percentage over the tracks of a separate railroad, the C. St. P. M. & O. Obviously, neither the C. & N. W. management nor

the C. & N. W. Sioux City Division employees were in a position to control or provide for satisfying any such demands.

Respondents, at pages 15-16 of their response to the petition for the writ, point out that in *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 11, this Court has refused to recognize the existence of a class or that those said to be in the class had interests which were identical, even where so stipulated by all parties to the action, if such was contrary to the fact. The respondents in the present case have alleged seniority rights on a stretch of track and over certain railroad runs, which the evidence shows is contrary to the fact. The Circuit Court of Appeals has based its conclusions on certain collective rights which are not asserted and which the evidence shows in fact not to be collective. That Court also found those rights not only to be collective but common to all in a certain class comprised of the respondents, while the evidence established that this was contrary to the fact, since many of the C. & N. W. Nebraska Division employees, as in the *Hansberry v. Lee* case, are free alternatively either to assert rights similar to those claimed by the respondents or to challenge them where their interests are adverse and conflicting, as is the fact in the present case. It is therefore clear that neither the disproved conclusions pleaded in respondents' petition, nor the unsupported conclusions of the Circuit Court of Appeals, both being affirmatively shown by the record to be contrary to the fact, can serve to aid any Federal Court in assuming jurisdiction of this case. To the contrary, the facts in the record affirmatively and conclusively show that the Federal Court does not have jurisdiction. See also *Milk Wagon Drivers Union of Chicago, etc., et al., v. Associated Milk Dealers, et al.*, 39 F. Supp. 671.

C

The Circuit Court of Appeals seemed to have no difficulty in finding that the aggregate claims of the respondents "for the life of the contracts will greatly exceed $3,000.00" (R. 64). The contracts to which the Court referred were the collective agreements (R. 65). The record before that Court did not disclose what was the "life of the contracts." However, the record does disclose (R. 39-41) that both the manner in which the work on the runs was allotted and the tracks over which the runs were operated have been changed more than once; and, further, that either railroad could at any time elect to handle the work entirely on its own lines, which would not only terminate the interrailroad runs entirely, but exclude all the employees of the other railroad from any part of that work. The allocation of the work as it is now made cannot be changed without creating a more serious and justified objection from either C. St. P. M. & O. employees or C. & N. W., Sioux City Division, employees, as the history of the controversy clearly establishes (R. 37-41, 45-8). Hence, the real "life" of there being any work to allocate in these interrailroad runs is limited to such time as it continues to be allocated as at present. Under such a situation its "life" cannot be such as would create any value whatever in the claims of these respondents which would require a different allocation, regardless of whether aggregated or not. See *System Federation No. 59, etc., v. Louisiana & A. Ry. Co.*, 119 F. (2d) 509, at page 515.

Further, the Circuit Court of Appeals fails to recognize the fact that railroad seniority in and of itself is of value only when had by a given man under given circumstances and in conjunction with the other fruits of collective bargaining, such as hours of work and rates of

pay. Respondents have failed to establish that there is any work which they want and which the employer is bound to provide to which any seniority is applicable. With the record in such a state there is no yardstick to use in establishing any value to respondents' claims.

But of course the basic error of the Circuit Court of Appeals was in trying to measure the value of respondents' claims by the life of contracts which had no connection whatever with those claims. The claims as asserted by the respondents not springing from or controlled by the collective agreements, there could be no collective rights asserted thereon which have any value, again, whether aggregated or not.

The burden of establishing jurisdiction rested on the respondents. *Kvos, Inc., v. Associated Press*, 299 U. S. 269, 81 L. Ed. 183; *McNutt v. General Motors Accept. Corp.*, 298 U. S. 178, 80 L. Ed. 1135; *Town of Lantana, Fla., v. Hopper*, 102 F. (2d) 118.

In *Kvos, Inc., v. Associated Press*, 299 U. S. 269, 81 L. Ed. 183, the Court said:

> "The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. It did not operate merely as a demurrer, for it did not assume the truth of the bill's averments. * * * On the contrary, the motion traversed the truth of the allegations as to amount in controversy and in support of the denial recited facts dehors the complaint. * * * They required the trial court to inquire as to its jurisdiction before considering the merits, * * *. Where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof. * * * And in such inquiry complainant had the burden of proof." Citing *McNutt v. General Motors Accept. Corp.*, 298 U. S. 178, 80 L. Ed. 1135.

The Court in *Town of Lantana, Florida, v. Hopper*, 102 F. (2d) 118, in referring with approval to *McNutt v. General Motors Accept. Corp., supra*, on March 9, 1939, said:

> "Federal courts are of limited jurisdiction, fixed by statute, and the presumption is against jurisdiction throughout the case. * * * After an exhaustive review of the previous authorities, it was held that the burden of proving the necessary jurisdictional facts rested upon complainant throughout the case. As this burden had not been sustained, the case was dismissed."

In any event, the jurisdictional question was raised, and, as stated in *McNutt v. General Motors Accept. Corp., supra:*

> "It is the duty of the Court, when it shall appear to its satisfaction that the suit does not really and substantially involve the necessary amount to give it jurisdiction, to dismiss the same, and this the Court may do whether the parties raise the question or not. In the present case the issue was raised by answer, and, therefore, it became necessary for the Court to determine the question of jurisdiction upon the facts presented. * * *"

After the District Court refused to proceed further and required respondents to make their showing on the jurisdictional question, as was held proper in *Page v. Wright*, 116 F. (2d) 449, and approved by the Eighth Circuit in this case (R. 63), respondents confined their attempts to meet this burden by filing ten affidavits (R. 23-32), merely reiterating the same formal conclusions as alleged in Paragraph 13 of their petition (R. 5). Although the District Court offered to give respondents a further opportunity to present evidence (R. 52) after petitioners' evidence was all submitted, the respondents elected to rely on the record as being sufficient to estab-

lish that they had the right to aggregate their claims, and that such aggregation established more than $3,000.00 to be in controversy (R. 52).

CONCLUSION

In conclusion, petitioners submit:

1. That respondents in their petition in the District Court erroneously claimed that the trackage involved from Omaha to Blair was, in fact, C. & N. W. trackage, and as such a part of the Nebraska Division of the C. & N. W., over which they had seniority rights. This was challenged appropriately in the District Court. Proof was called for. Affidavits were submitted by petitioners showing that trackage to belong to the C. St. P. M. & O., a separate railroad. Respondents offered no counter-proof. This left the fact unchallenged.

2. Respondents in the District Court in their petition alleged that there was more than $3,000.00 involved as to each plaintiff. This was appropriately challenged. Proof was called for. Petitioners showed that no such amounts could be involved as to each plaintiff. Respondents furnished no counter-proof, and finally admitted the truth of petitioners' showing on that point.

3. The Circuit Court of Appeals misconceived the distinction between ordinary collective agreements establishing seniority rights, and the interrailroad agreement involved here for the division of work between employees of two different railroads where traffic had been diverted from one to the other for operating reasons. The Circuit Court of Appeals upon this erroneous premise concluded seniority rights were involved in the interrailroad agreement, and without any evidence to support it, assumed that the life of such agreement would be such that the value of the runs to the respondents, if their

seniority entitled them to any of the runs, must be more than $3,000.00. Hence, the Court of Appeals asserts this case to represent a true class action, notwithstanding the asserted position of the respondents was that it was only a spurious class action.

Petitioners therefore submit that the true measure of the controversy is found in *Clark v. Gray*, supra, and that the District Court was right in so considering the case. We therefore respectfully submit that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

W. C. Fraser,
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J. M. Grimm,
V. C. Shuttleworth,
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Counsel for Petitioners George Kimball, Order of Railway Conductors, and Brotherhood of Railroad Trainmen.

Wymer Dressler,
Robert D. Neely,
Of Dressler & Neely, Omaha, Nebr.,

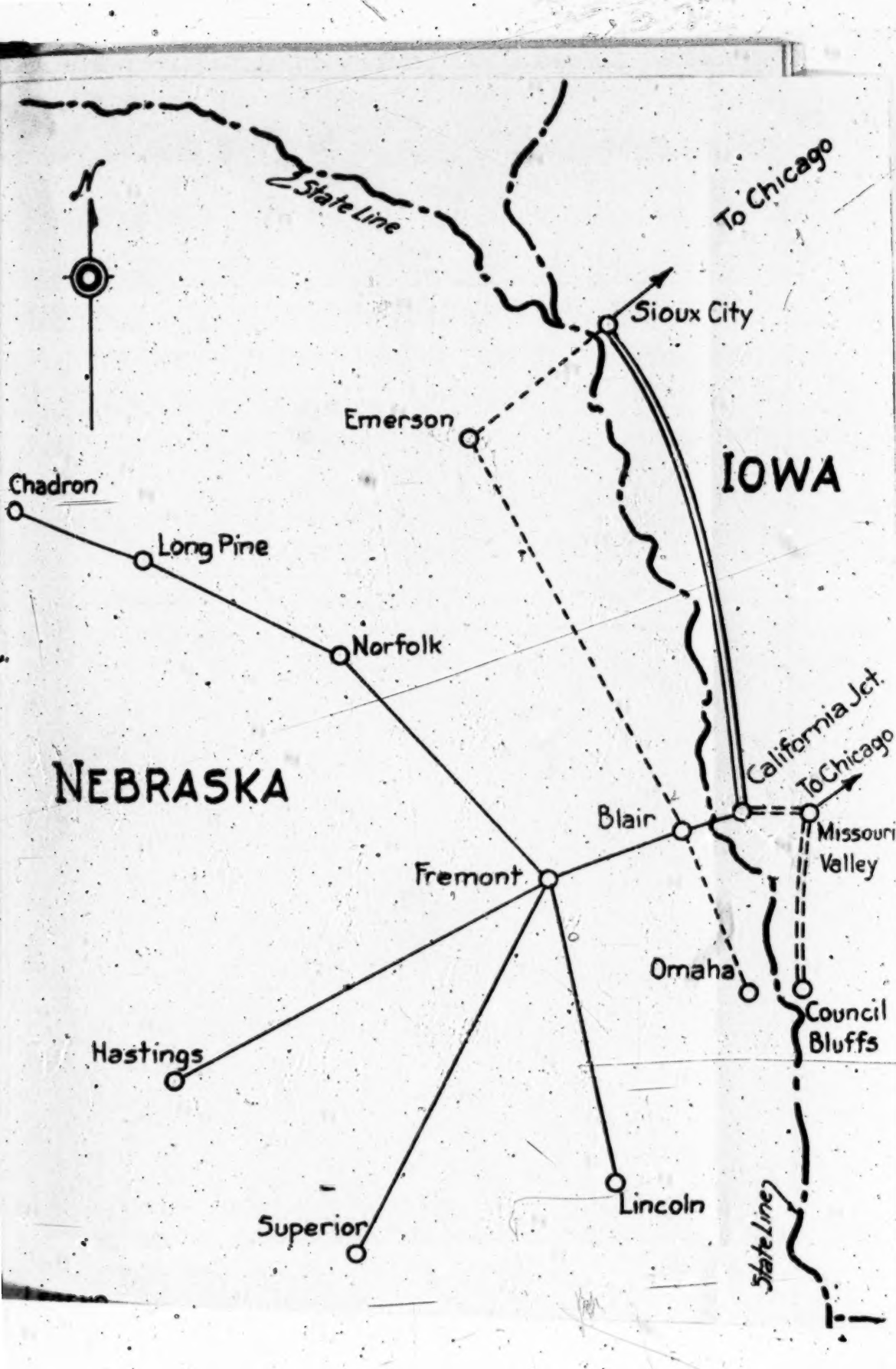
W. T. Faricy,
Samuel H. Cady,
Chicago, Ill.,
Counsel for Petitioner Charles M. Thomson, Trustee.

APPENDIX

Sections 20-205 and 20-206, Compiled Statutes of Nebraska, 1929:

20-205. "Written Contracts, Foreign Judgments. Within five years, an action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment."

20-206. "Oral Contracts, Statutory Liabilities. Within four years, an action upon a contract, not in writing, expressed or implied; an action upon a liability created by statute, other than a forfeiture or penalty."


N
State Line
To Chicago
Sioux City
Emerson
IOWA
Chadron
Long Pine
Norfolk
NEBRASKA
California Jct.
To Chicago
Blair
Missouri Valley
Fremont
Omaha
Council Bluffs
Hastings
Lincoln
Superior
State Line

IN THE

Supreme Court of the United States

October Term, 1941

No. 139

CHARLES M. THOMSON, Trustee for Property of Chicago & Northwestern Railway Company; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; and BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

vs.

BARNEY E. GASKILL, Et Al.,

Respondents.

REPLY BRIEF OF PETITIONERS ON CERTIORARI

W. C. FRASER,
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Law Briefs—OMAHA LINO-SEUG CO.—418 So. 15th St.

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Respondents.

REPLY BRIEF OF PETITIONERS ON CERTIORARI

Respondents in their brief epitomize their contention at the bottom of page 38 as follows: "It is our contention that the allegations in the plaintiffs' petition as to mileage and percentage controls, and the defendants have no right in this preliminary hearing as to jurisdiction to claim that we were only entitled to 7½ miles."

This pronouncement is contrary to respondents' own legal Proposition II, on page 18 of their brief, citing numerous cases from this Court. Perhaps the case which more nearly corresponds to this case is *Kvos v. Associated*

Press, 299 U. S. 269, 81 L. Ed. 183. The language is quoted on page 34 of petitioners' brief. Thus, notwithstanding the above quoted statement from respondents' brief, their citations and ours are the same, and agree that the pleadings are not conclusive, but that proof in the record by affidavits, as in the *Kvos* case and here, may be resorted to in a test of jurisdictional amount.

We have no doubt that the case last cited, and *Clark v. Gray*, 306 U. S. 583, 83 L. Ed. 1001; *Gibbs v. Buck*, 307 U. S. 66, 83 L. Ed. 1111; and *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 11, settle the law as to jurisdiction in class actions, as well as the method of challenging jurisdiction in such cases.

The claims of respondents as argued in their brief amount to this:

1. That these 41 respondents constitute a class or the class of persons who would be affected if the relief which they demand is granted. The truth is that there are numerous conductors employed on the C. & N. W. Nebraska Division who have greater seniority rights than any of the respondents, yet they are not made parties, nor do these 41 respondents claim to be acting on behalf of all men on the Division. They merely allege that these respondents "belong to what is known as the Nebraska Division of Trainmen in the employ of the Chicago and North Western Railway Company and its Trustee" (Par. 7, Pet. R. 3).

2. These respondents claim that the railroad line from Omaha to Blair is a part of the C. & N. W. Railway, and of the Nebraska Division of that Company. The affidavits on file show this is not true, but that this track-

age belongs to the C. St. P. M. & O. Railway, a separately operated and managed road. The affidavits also show that these respondents, as employees of the C. & N. W., have no seniority rights whatever on that stretch of track because it is not C. & N. W. track but C. St. P. M. & O. track (R. 38-40). Nevertheless, the respondents in their argument insist on counting the mileage of that track in calculating the jurisdictional amount.

3. The respondents allege that their seniority rights on the C. & N. W. Nebraska Division result from collective bargaining agreements known as schedules. This is correct. But the railroad does not agree that the track from Omaha to Blair is any part of the C. & N. W. Nebraska Division. It has proved that it is not.

4. Respondents claim that their seniority rights under the collective bargaining agreements applicable on the C. & N. W. and as a part of the schedules under which they work (R. 2), have been interfered with by a separate and distinct agreement entered into in 1930 between the Management of the C. & N. W. and the Unions, as to certain runs between Omaha and Sioux City primarily carrying C. St. P. M. & O. freight. The affidavits in the record, page 47, show these to be inter-railroad runs, and not inter-division runs. It is equally proved that seniority rights do not apply to inter-railroad runs (R. 38).

Finally, respondents make the point, as shown in Proposition IV of their points, page 19, and at pages 60-61 of their brief, that respondents' action is a spurious class action, then seek to convert that into a true class action by arguing that respondents' several rights are so interwoven that they cannot be determined without the

presence of all of them in the suit. That argument has been answered by this Court in *Clark v. Gray,* supra. Right of joinder does not confer jurisdiction. Lacking the individual jurisdictional amount involved, the Federal Court has no jurisdiction of a spurious class action, regardless of the common question of law or fact.

Respondents' claims, therefore, in the brief, that this is a class action over which the Federal Court has jurisdiction is based upon the following false assumptions:

(a) That the respondents represent all of the men on the C. & N. W. Nebraska Division. They do not, and do not pretend to so represent them in the petition.

(b) That the track from Omaha to Blair is C. & N. W. track and a part of the C. & N. W. Nebraska Division. That is shown to be false (R. 39-40).

(c) That the separate agreement made between the Managements of the two railroads and the Unions (R. 40-41) infringed seniority rights of the respondents over the trackage between Blair and Omaha. That cannot be true because neither the respondents nor any other C. & N. W. employees have any seniority rights on that trackage (R. 38), nor over any part of the inter-railroad run involved (R. 39-40).

The ultimate effect of respondents' success in this case would be to destroy the rights of the C. St. P. M. & O. railroad men to operate trains carrying traffc of that company between Omaha and Sioux City via Blair and California Junction, and to force a division of those runs between employees of the C. & N. W. exclusively, giving

part of it to the C. & N. W. Nebraska Division men and the balance to the C. & N. W. Sioux City Division men on a mileage basis. Thus the respondents in reality seek to destroy completely the rights of the C. St. P. M. & O. men without even joining them as parties to the suit. The rights of the C. St. P. M. & O. Railway itself are necessarily involved in such a controversy, because if respondents are successful, that railroad cannot handle any part of its traffic between Omaha and Sioux City with its own train crews, but must turn it over to C. & N. W. train crews. Such a destruction of the C. St. P. M. & O. Company's rights cannot be tolerated without giving that Company a chance to defend its rights by being a party to the suit.

A further result of the litigation would be to adjudicate the rights of the men on the C. & N. W. Sioux City Division to run over the C. St. P. M. & O. line from Blair to Omaha and return under the inter-railroad agreement, which is challenged by the device of making only one member of that division a party to the suit, and saying that he may, if he wants to, represent his class. Such a device in disposing of the rights of an entire class is contrary to all the cases, as shown by *Hansberry v. Lee,* supra, that in order to bind the individuals of a class a sufficient number must be joined as parties to insure that the rights of all of the class will be protected. To join only one of a large number of persons in a class does not comply with that rule. Respondents resent the fact that the Unions have come into the case. Apparently they did not intend that the C. & N. W. Sioux City Division men as a class be actually represented at all.

Yet the presence of the Unions in the suit has a threefold purpose as shown by the motions and affidavits filed by the Unions. First, to show that respondents do not in fact represent all of the men on the C. & N. W. Nebraska Division. The Unions do represent all of them by virtue of their position as bargaining agent for all of them, and they have taken a position adverse to the contentions of these respondents. Second, the Unions do represent all of the men of the C. & N. W. Sioux City Division by virtue of the fact that they are the bargaining agents for those men, and again they take a position adverse to these respondents. Third, the Unions seek to uphold the integrity of their agreement with the Managements of both companies, dividing the disputed work between the employees of the C. St. P. M. & O. and the employees of the C. & N. W. Sioux City Division.

These are all legitimate positions for the Unions to assume. Their attitude shows that these respondents do not in fact represent either the men of the C. & N. W. Nebraska Division as a class, nor the men of the C. & N. W. Sioux City Division as a class, but in fact represent only themselves, and that their contentions are adverse to both classes. This demonstrates that respondents' claims are individual and cannot be aggregated for jurisdictional purposes.

We respectfully submit that the Circuit Court of Appeals erred in assuming that the seniority rights of respondents on their own Division, which is definitely an individual right, relative among themselves, can be the basis for the respondents to attempt to coerce the two railroads and the Unions to assign to respondents a portion of these inter-railroad runs, and that this right is a

collective right which warrants the accumulation of the amounts involved.

Respectfully submitted,

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W. T. Faricy,
Samuel H. Cady,
Chicago, Ill.,
Counsel for Petitioner Charles M. Thomson, Trustee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; AND BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners, and Appellees Below,

vs.

BARNEY E. GASKILL, ET AL.,

Respondents and Appellants Below.

BRIEF OF BARNEY E. GASKILL, ET AL., IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

NELSON C. PRATT
BARNEY E. GASKILL,
GEORGE BURGER,
S. L. WINTERS,
Counsel for Respondents and Appellants Below.

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SUPREME COURT OF THE UNITED STATES

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No. 139

CHARLES M. THOMSON, TRUSTEE FOR PROPERTY OF CHICAGO & NORTHWESTERN RAILWAY COMPANY; GEORGE KIMBALL; ORDER OF RAILWAY CONDUCTORS; AND BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners, and Appellees Below,

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BARNEY E. GASKILL, ET AL.,

Respondents and Appellants Below.

BRIEF OF BARNEY E. GASKILL, ET AL., IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

STATEMENT OF MATTER INVOLVED

The opinion against which the petition for writ of certiorari is desired is found on Page 72 of the Transcript of Record, and also reported in the 119 Fed. (2d), Vol 1, dated June 2, 1941, Page 105, clearly holding that this was an action brought by some 41 conductors and trainmen belonging to a class or group of employees who sought a judgment that they were entitled to perform work of conductors and trainmen under contracts executed with the railroad company, notwithstanding the claim of any individual did not amount to $3000.00, where aggregate claims of all trainmen greatly exceeded that amount, and

before individual rights could be determined, the rights of the group had to be ascertained.

The plaintiffs in the court below sought to have their seniority rights *restored to them*, and they had alleged that the railroad company had taken them away from them, and gave them to another group of employees, and that group was made a party to that proceeding by serving notice on one, George Kimball, as representative of that class, so that he might, if he so desired, set forth their claims in order that there might be a full determination of the rights of all parties in one proceeding, and thus avoid placing the defendant railroad company or its trustee beyond the danger of having to respond twice for the same damage.

As shown by the opinion it was alleged in our petition below, that the rights of the individual plaintiffs, members of the Nebraska Trainmen's Division, *in respect to each other*, are fixed by so-called seniority rules by which defendant Trustee is bound, and that such individual rights are ascertainable by computation, but that the right of each is related to the right of the others, and that all of the members are necessary parties to such a determination. Plaintiffs sought to have determined, that the defendant railroad company and its Trustee had been obligated by the contract to allot the said work to the members of the Nebraska Division of Trainmen, including the plaintiffs. The plaintiffs prayed that an accounting be made of the amount and cost of the work that should have been allotted to the Nebraska Division, but which had been wrongfully allotted to others, and that the amount of work that each of the plaintiffs had been wrongfully deprived of be determined, and that judgment be given each of the plaintiffs for such

an amount as he would have earned if his right to perform the work had not been wrongfully denied him.

The plaintiffs in Paragraph 8 of their petition (shown at Page 4, Transcript of Record filed herein), alleged that the controversy arises over the division of seniority rights between the Nebraska Division, to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs over the Northwestern Railroad from Omaha, Nebraska, to Sioux City, Iowa. That the trains as run between these two points comprise interdivisional runs by reason of the fact that the trains move over 31.3 miles of the Nebraska Division, or 30.7% of the distance between the two points, Omaha and Sioux City, Iowa, and that when trains are operating over two or more seniority districts the conductors and brakemen of the district involved are entitled to seniority rights on mileage percentage basis on miles run over each seniority district.

The plaintiffs further alleged that up to May 1, 1930, this was the basis upon which the seniority rights were recognized and enforced, but that on May 1, 1930, the defendant railroad company and its successor defendant trustee has refused to assign to plaintiffs any of the work over the trackage over the two points above referred to, although they have been frequently requested so to do, but that on the contrary have given to the Sioux City Division all of said work, which should have been divided proportionately as above alleged between the Sioux City Division and the plaintiffs herein, although the plaintiffs have at all times been on the regularly assigned list showing their seniority rights, and have been ready and willing at all times to perform said train service over the Nebraska

Division, between Omaha, Nebraska, and California Junction, Iowa, on said interdivisional train runs.

They further alleged that the railroad company and its Trustee, claimed that the rights herein sought to be enforced by the plaintiffs under their seniority rights have been abrogated by an alleged agreement between the said defendant railroad trainmen, and the Order of Railway Conductors above referred to, which new alleged agreement they claim had cut off the rights of plaintiffs to their proportionate share of the work as herein complained of, but these plaintiffs alleged further that the seniority list under which they claimed had been yearly prepared and published by the railroad company, and its Trustee above referred to gives the names of all the employees in the Nebraska Division together with the dates of their seniority.

Prayer of Petition

The prayer of the petition was that they be restored to their seniority rights as herein set forth, and that an accounting be had of the amounts due the various plaintiffs herein in the order of their seniority rights, and the defendant railroad company be compelled to produce its record showing the traffic handled and by whom handled, and the amount of work done, and judgment be rendered against the defendant railroad or its Trustee in favor of each individual plaintiff for the amount found due him, AND THAT IN THE FUTURE THE RAILROAD OR ITS TRUSTEE BE COMPELLED TO ASSIGN TO THE PLAINIFFS IN THE ORDER OF THEIR SENIORITY THEIR RIGHTS TO OPERATE ON THE RUNS IN CONTROVERSY, AND THAT THE DEFENDANT, GEORGE

KIMBALL, REPRESENTING THE SIOUX CITY, IOWA, TRAINMEN DIVISION BE COMPELLED TO RECOGNIZE PLAINTIFFS' SENIORITY RIGHTS IN SAID WORK BY THE SIOUX CITY DIVISION, WHICH HAS RESULTED IN LOSS OF TIME AND MONEY TO THE PLAINTIFFS, AND THAT THEY BE REIMBURSED FOR SAID TIME AND MONEY LOST AS HEREIN PRAYED, AND THE DEFENDANTS ALSO BE COMPELLED TO RECOGNIZE SAID RIGHTS UNTIL SAID RIGHTS SHALL BE RIGHTFULLY TERMINATED BY THE PARTIES HERETO, AND THAT THEY HAVE SUCH OTHER AND FURTHER RELIEF AS MAY BE JUST AND EQUITABLE IN THE PREMISES. (See Transcript of Record Page 4 to 7 Inc. for Petition and Prayer.)

How Case Was Decided

Issues were joined by the trustee, but all party defendants questioned the jurisdiction of the district court as to the amount in controversy, diversity of citizenship being conceded. The sole question tried out by the District Court was the question of whether or not the amount in controversy was sufficient to give the court jurisdiction. The District court found that the claims of the plaintiffs were separable and could not be aggregated to make up the jurisdictional amount, and that no plaintiff had shown the requisite amount involved as to his claim, and for that reason *only*, the case was dismissed for want of jurisdiction.

The circuit court in its opinion held that the criterion adopted for determination of the matter in controversy in the action and the value thereof was erroneous. The court saying, that the essential matter in controversy disclosed

by the pleadings and the evidence is the right of the members of the Nebraska Division of Trainmen, identified by their membership in that group or class, to perform the work of conductors and trainmen upon the stretch or run of railroad *described in the complaint.*

Allegation in Complaint Controls

As before set out the stretch described in the complaint was 31 and a fraction miles, while the affidavits filed by the defendants were confined to only 7 and a fraction miles, and it is our contention that the allegation in the *complaint controls.*

The railroad has denied the right and does now, and will continue to deny the Nebraska Division of Trainmen, that is the class or group of workmen which asserts and claims it. That is the dispute and that defines the essential matter in controversy. Under these circumstances the issue on jurisdiction is the value of the right of the Nebraska Division of Trainmen to carry on through its members the work they claim the several contracts of the railroad have alloted to the Nebraska Division of Trainmen. Although no individual plaintiff has yet lost the sum of $3000.00 through being deprived of the claimed right to do the work, the testimony very clearly establishes that the amount involved in the controversy, as we have stated it, does greatly exceed the jurisdictional requirement. The trainmen and conductor wages on the designated runs for the life of the contracts will greatly exceed $3000.00.

The court went on to say, that the principles that governed in *Gibbs* v. *Buck*, 307 U. S. 66, 59 S. C. R. 725, were applicable to this case and required the court to hold that the matter in controversy, the value of the aggregate

rights of all the members of the Nebraska Division of Trainmen to be alloted work while the alleged contracts continue and to recover a sum of money as damages for work heretofore wrongfully denied them, exceeds $3000.00 in value and that the case is within federal jurisdiction. The court went on to say, that the prohibition against doing the work is against the class and the plaintiffs constitute the class. That the railroad has not prohibited the plaintiffs from membership in the Nebraska Division of Trainmen, but the reason for its refusal of the work to the plaintiffs is that another Division of Trainmen, and not the Nebraska Division, is entitled to that work. They go on to point out that no individual plaintiff can obtain any relief in the action until their collective right as a class is established. The common and collective right of the conductors and trainmen to recognition by the railroad of their Nebraska Division of Trainmen is fairly analogous to the common and collective right of the authors and publishers to preserve the immunity of their society from the action of the state of Florida in *Gibbs* v. *Buck, supra.* As in the Gibbs case, these plaintiffs have a common and undivided interest in the matter of establishing the right of their class. The aggregate value of the work claimed by the class is therefore the criterion for jurisdiction.

The court very specifically points out that they have not considered any question *going to the merits of the case* or the *sufficiency of the pleadings.* The *sole question* being, the *question of jurisdiction raised on the appeal.*

POINTS AND AUTHORITIES

The jurisdiction conferred on the Supreme Court to review decrees of the Circuit Court of Appeals on certiorari, was not conferred to give the defeated parties another hearing, but to secure uniformity of decisions, and to bring up cases of importance which it is in the public interest to have decided by the court of last resort.

Magnum Import Co. v. *Coty*, 262 U. S. 159, 43 S. C. R. 531.

Federal Trade Commission v. *American Tobacco Co.*, 274 U. S. 543, 47 S. C. R. 663.

On certiorari the Supreme Court will limit its consideration of the case to the questions specifically brought forward by the petition for the writ, and the brief supporting is not part of the petition, at least for the purpose of stating the question on which review is sought.

General Talking Pictures Corp. v. *Western El. Co.*, 304 U. S. 175, and (546), 58 S. C. R. 849, rehearing denied, 59 S. C. R. 116 and 355.

Southern Power Co. v. *North Carolina Pub. Ser. Co.*, 263 U. S. 508, 44 S. C. R. 164.

U. S. v. *Johnston*, 268 U. S. 220, 45 S. C. R. 496.

Rorick v. *Devon Syndicate*, 307 U. S. 299, 59 S. C. R. 877 (879).

National Licorice Co. v. *Nat'l. Labor Board*, 309 U. S. 350, 60 S. C. R. 569.

Where there is no conflict between Circuit Courts of Appeals petition for writ on that ground will not be granted.

Layne Corp. v. *Western Well Works*, 261 U. S. 387, 43 S. C. R. 422.

Crowell v. *Benson*, 285 U. S. 22, 52 S. C. R. 285 (298).

The Supreme Court will not ordinarily grant certiorari to review judgment based solely on questions of fact.

National Relation Board v. *Waterman*, 309 U. S. 206, 60 S. C. R. 493. Rehearing denied 309 U. S. 696, 60 S. C. R. 611.

Nor will the writ be granted to review the evidence or inferences taken from it.

General Talking Pictures Corp. v. *Western Electric Co.*, supra.

Questions of fact are not of sufficient importance or of public interest, and are not certifiable.

Federal Trade Commission v. *American Tobacco Co.*, 274 U. S. 543, 47 S. C. R. 663.

It is elementary that on a motion to dismiss for want of jurisdiction the court will not ordinarily enter into a consideration of the merits of the case.

Stiegleder v. *McQuesten*, 198 U. S. 141, 25 S. C. R. 616, 25 C. Jur. Sec. 106, Page 793.

Where the jurisdictional question necessarily involves a consideration of the merits it should be tried on formal pleadings.

Illinois Central Railroad Company v. *Adams*, 180 U. S. 28, 21 S. C. R. 251.

Smithers v. *Smith*, 204 U. S. 632, 27 S. C. R. 297.

ARGUMENT

At Page 10 of the petitioners' petition and brief, they seek to go into the merits of the controversy, as to whether or not the Nebraska Division was entitled to operate on 31 and a fraction miles, or on 7 and a fraction miles, but it is our contention as set out in the lower court's opinion,

that the allegation in the *complaint* controls, and that this court will not review on an application for writ of certiorari the facts involved, and will confine itself solely to the question as to whether or not this decision is in conflict with any other Circuit Court of Appeals' opinion on like matters, or whether or not this case is such a matter of importance that the Supreme Court will assume jurisdiction on account of the public interest and pass upon the question.

Grounds for Petition of Certiorari

The reason set out on Page 7 of petitioners' petition and brief is first, that the decision of the Circuit Court of Appeals for the Eighth Circuit as to the right of a group of plaintiffs to aggregate their claims for jurisdictional purposes is in conflict with the decisions of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. (2d) 85, and *Hackner* v. *Guaranty Trust Co.*, 117 F. (2d) 95, and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Atwood* v. *Natl. Bk. of Lima*, 115 Fed. (2d.) 861.

Case Not in Conflict With Circuit Court of Appeals Case

Our answer is that none of those cases involve a decision *on the same matter*, nor are they in conflict with this case.

In *Atwood* v. *Natl. Bk. of Lima*, 115 Fed. (2d.) 861, there was a suit commenced by certain beneficiaries to have their interest in certain trust fund determined, nominating the trust and directing the defendant to pay to *each* plaintiff *his* or *her* part of said trust estate. The court rightfully held, that those were separable controversies. That while

the trust was unitary the ascertained right of each of the heirs or next of kin to share in it was single and separate, as there was no allegation that any one had $3000.00. The court rightfully held, that their claims could not be aggregated, and the case was reversed to allow an allegation to be made as to any one having $3000.00 involved or not. That there was no *common interest involved* in that lawsuit. They distinguished, however, a case in the 16 Fed. (2d.) 744, where was involved a partition suit of lands where all heirs were clearly indispensable. As their rights had to be determined among themselves and the value of the lands to be partitioned determined by the amount in controversy.

In *Central Mexico Light & Power Co.* v. *Munch*, 116 Fed. (2d.) 85, a suit was brought by a corporation and its associated companies, to enjoin an action on matured bonds secured by certain due and unpaid first mortgages. The plaintiffs claimed to represent all who had any interest in the controversy, there were allegations of conspiracy among the bondholders to obtain an inequitable advantage, and fraud was also alleged. The court held, that there was no proof of conspiracy, nor of fraud. That without such showing an aggregation of the claims would not be justified, particularly in absence of showing that the action would have brought about the alleged result. The court said, that no *joint* or *common* interest was shown, and they simply asked for an adjudication as to the various rights of the parties, and as there was no $3000.00 requisite as to any one of the parties, the Federal Court had no jurisdiction.

In *Hackner* v. *Guaranty Trust Co.*, 117 Fed (2d.) 95, the court held, while the interest of all are common and in-

volve a common question of law and fact, the record showed that the plaintiffs each had a separate and distinct demand, but simply joined in a single suit and asked individual judgments and division of the various amount to the rightful owner. The court held, that there was no joint right involved, and that clearly each plaintiff in that case must show that he himself was misled, and as a result he suffered loss. The court saying, that aggregation to make amount is permitted only when it is sought to enforce a single title or right in which *plaintiffs have a common interest.* Distinguishing the Pinel case cited, *Shields* v. *Thomas,* and *Troy Bank* v. *Whitehead,* which we will refer to later.

Nor With Decision of Supreme Court

In their second ground set out in the petition the petitioners claim that this case is in conflict with the distinction made by two decisions of this court rendered on the same day, namely, *Gibbs* v. *Buck,* 307 U. S. 66, *Clark* v. *Gray,* 306 U. S. 583, and *Hansberry* v. *Lee,* 311 U. S. 32.

In the *Clark* v. *Gray* case, 306 U. S. 583, 59 S. C. R. 744, the suit was brought to test the validity of the Caravan Act of California, not a Federal Statute. Appellees, numerous individuals, co-partners, and corporations joined in bringing the present suit against appellants, charged with the duty of enforcing the act, and praying for an injunction. The rights of each were only a small amount, but the suit was brought to enjoin appellants from collecting the fees and enforcing the provisions of the statute. The District Court held, that the amount involved was in excess of $3000.00. A motion of appellants in the court below to dismiss the bill for want of jurisdictional amount was with-

drawn, and the jurisdiction was not challenged by the parties in the Supreme Court. But on the argument in the Supreme Court it appeared doubtful whether the matter in controversy exceeded the sum or value of $3000.-00. The court itself raised the question. The court said, as it is plain, although the petition alleged generally that the amount involved was in excess of $3000.00, it was insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having *no joint or common interest, or title in the subject matter of the suit.* And the bill on its face showed that each appellee maintained his own separate and independent business, which is said to be affected by the challenged fees, that *no joint or common interest in the subject matter of the suit is shown.* The court going on to say, "It is a familiar rule, that when several plaintiffs assert separate and distinct demands in a single suit, the amount involved in each separate controversy must be of the requisite amount, to be within the jurisdiction of the district court, and that those amounts cannot be added together to satisfy the jurisdictional requirements. And that as the claim due any single plaintiff did not exceed the jurisdictional amount, it was insufficient to show that the District Court had jurisdiction as to all except one plaintiff, who did make that showing, they dismissed the case for want of jurisdiction, as to all plaintiffs except Paul Gray."

In the *Gibbs* v. *Buck case,* 307 U. S. 66, 59 S. C. R. 725, which was an appeal from an order of a three judge court refusing to dismiss the bill on motion for failure to set out facts to show Federal or Equity jurisdiction, and granting an injunction against the enforcement of a Florida Statute aimed at combinations fixing the price for the privilege

of rendering privately or publicly for profit copyrighted musical compositions. The complainants were the American Society of Composers, Authors and Publishers, and Buck as president of the Society. The suit was brought on behalf of themselves and others similarly situated, members of the Society, too numerous to make it practical to join them as plaintiffs in a matter of *common and general interest*. There was a formal allegation that the matter in controversy exceeded $3000.00, exclusive of interest and costs, and in addition the bill alleged that the three publishers owned copyrights of a value in excess of $1,000,000 while each of the individual complainants owned copyrights worth in excess of $100,000. Appellants moved to dismiss on the ground that it affirmatively appears from the allegations of the bill that the jurisdictional amount of $3000.00 is not involved, in that it appears that the suit is brought for the benefit of the American Society of Composers, Authors and Publishers, and it does not affirmatively appear that the loss of *any member* of said society due to the enforcement of the challenged act would amount to the necessary jurisdictional amount. The court laid down the rule that under the complaint Federal jurisdiction will be adequately established if it appears that for any member, who is made a party, the matter in controversy is of the value of the jurisdictional amount, or IF TO THE AGGREGATE OF ALL THE MEMBERS IN THIS REPRESENTATIVE SUIT, THE MATTER IN CONTROVERSY IS OF THAT VALUE. The court saying, that they have a common and undivided interest in the matter in controversy in this class suit. Citing *Troy Bank* v. *Whitehead*, 222 U. S. 39, and that under the circumstances in that case, the issue on jurisdiction is the value of the right to conduct the business free of the prohibition of the statute.

It is our contention that this rule is applicable here, as we are seeking the protection of our seniority rights taken from us by the railroad company and the unions and transferred to the Sioux City Division, and that, therefore, the amount in controversy is not only the aggregate amount that each individual has already suffered, but the aggregate amount they will suffer in the future arising out of a common interest still undivided that they have in said seniority rights. These rights cannot be adequately asserted in individual suits brought by each one of the plaintiffs, because before they can have their seniority rights determined the co-plaintiffs are entitled to be heard as to whether they are entitled to those rights and also Kimball and his division if he so desired. Therefore, all the plaintiffs have been denied their common right still unapportioned in the future of their earning under said common written instrument, which guaranteed them these rights.

The only other case in which petitioners claim that this decision is in conflict is that of *Hansberry* v. *Lee*, 311 U. S. 32, 61 S. C. R. 115, 132 A. L. R. 741, but that suit was a suit to enjoin the violation of an agreement restricting the use of land, on the doctrine of res judicata, based upon a judgment in a prior suit in which they were neither parties nor in privity with any party enforcing the agreement, upon the stipulation of the parties to that suit, *contrary to the fact*, that the requirement in the agreement that it be signed by a certain percentage of the frontage owners before becoming effective had been sufficiently complied with, thereby precluding the defendants in the second suit from asserting that the agreement was never signed by the required number of frontage owners, upon the theory that the first suit was a class suit, and that the de-

fendants in the second suit were members of that class and so represented in the suit, constitutes a denial to such defendants of due process of law, where the defendants in the first suit *were not treated as a class*, and it was not shown that they were more interested in defeating than in upholding the agreement, especially since restrictive agreements of this kind create *several*, not *joint, obligations*, and the rights and interests of the various landowners under such agreements are of a dual nature and are just as likely to be conflicting as to be identical. In the former suit the defendants were not made a party, nor made a party by service of process, which violates the due process clauses of the Fifth and Fourteenth Amendments. After first stating that the general rule was, that a party is bound by the judgment, where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is *joint*, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. Citing numerous cases of the Supreme Court. The court going on to say, in such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

Nowhere in that case was the question of jurisdictional amount by aggregating the claims of the plaintiffs dis-

cussed nor considered. Attached to this case in the 132 A. L. R. is an extensive note on Class Suits and none of them apparently involve the question of jurisdictional amount, only the question as to how far members of a class can bind the remaining members.

This case, therefore, is not in conflict with any other Circuit Court of Appeals case, *involving the same matter.* Therefore, the court should not consider it on that ground.

This Case Not One of Public Importance

The remaining contention in the third and fourth ground of petitioners' petition, is, that this case is in conflict with the weight of authority, and an erroneous decision of an important question of general law, as to call for an exercise of this Court's power of supervision. Our answer to that is, that the jurisdiction conferred on the Supreme Court to review decrees of the Circuit Court of Appeals on certiorari, was not conferred to give the defeated parties *another hearing,* but to secure uniformity of decisions, and to bring up cases of importance which it is in the public interest to have decided by the court of last resort. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 43 S. C. R. 531.

Questions Not Important

Federal Trade Commission v. *American Tobacco Co.,* 274 U. S. 543, 47 S. C. R. 663, where the court held, that the question of fact in that case was not of sufficient importance or of public interest, and not certifiable.

On certiorari the Supreme Court will limit its consideration of the case to the questions specifically brought forward by the petition for the writ, and the brief supporting is not part of the petition, at least for the purpose of stating

the question on which review is sought. *General Talking Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175 and (546), 58 S. C. R. 849, rehearing denied 59 S. C. R. 116 and 355. Following *Southern Power Co.* v. *North Carolina Pub. Ser. Co.*; 263 U. S. 508, 44 S. C. R. 164. And *U. S.* v. *Johnston*, 268 U. S. 220, 45 S. C. R. 496.

Cannot Review Questions of Fact on Certiorari

Also *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 59 S. C. R. 877 (879). *National Licorice Co.* v. *Natl. Labor Board*, 309 U. S. 350, 60 S. C. R. 569.

Nor will it lie where there is no conflict between Circuit Courts of Appeals. *Layne Corp v. Western Well Works*, 261 U. S. 387, 43 S. C. R. 422, and *Crowell* v. *Benson*, 285 U. S. 22, 52 S. C. R. 285 (298).

On page 10 of petitioners' brief in a statement of the case, they seek to go into the questions to whether or not 31 and a fraction miles, or 7 and a fraction miles should be taken into consideration, and they claim that part of the mileage was operated by a separate, but it is our contention that was not involved in this jurisdictional question.

The lower court in its opinion specifically so stated where at the end of the opinion they say, "we have not considered any question going to the merits of the case or the sufficiency of the pleadings." And in another place they assume that the stretch or run of railroad described in the *complaint* is what controls, and that is our contention.

This court has announced the rule that they do not ordinarily grant certiorari to review judgment based solely

on questions of fact. *National Relation Board* v. *Waterman*, 309 U. S. 206, 60 S. C. R. 493. Rehearing denied 309 U. S. 696, 60 S. C. R. 611.

The writ will not be granted to review the evidence or inferences taken from it. *General Talking Pictures Corp.* v. *Western El. Co.*, 304 U. S. 175 and 546, 58 S. C. R. 849, rehearing denied 59 S. C. R. 116 and 355.

Therefore, this question is not involved, also because the petition does not request a review on the evidence, and there was no attempt on the part of either the district court or the Circuit Court of Appeals to pass on any question of fact, except as to the question of jurisdictional amount.

At the back of petitioners' application and brief is a diagram purporting to support petitioners' claim that this Nebraska division was only entitled to 7 and a fraction miles rather than 31 and a fraction, which is alleged in the complaint. But our answer to that is, that that question is not involved in this appeal as it is elementary, that on a motion to dismiss for want of jurisdiction the court will not ordinarily enter into a consideration of the merits of the case. *Stiegleder* v. *McQuesten*, 198 U. S. 141, 25 S. C. R. 616, 25 C. J. Sec. 106, page 793.

The rule in C. J. being as follows: "the statute referring to the judicial code confers no power to summarily decide matters in issue going to the merits of the controversy." *Smithers* v. *Smith*, 204 U. S. 632, 27 S. C. R. 297. And where the jurisdictional question necessarily involves the consideration of the merits it should be tried on formal pleadings. The rule being that a question which belongs to the merits rather than to the jurisdiction should not be

raised by motion to dismiss, but by demurrer or other pleadings in the regular process of the cause. *Illinois Central Railroad Company* v. *Adams*, 180 U. S. 28, 21 S. C. R. 251.

In the *Smithers* v. *Smith* case it is stated, "that such an authority to dismiss should not be unlimited, and its limits ought to be ascertained and observed, lest under the guise of determining jurisdiction the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury." It was held there, "that in trespass to try title to land worth more than the jurisdictional amount brought against several defendants a decision that defendants acted separately and not jointly and that the damages recoverable against each separately was less than the required amount is not a determination of a jurisdictional fact but of an essential element of the merits.

It is our contention, therefore, that there is no conflict between this decision and any other Circuit Court of Appeals decision, nor of the Supreme Court of the State, and the case is not of sufficient importance, or of public interest to warrant this court in reviewing the lower court's decision. This is not an appellate proceeding, therefore, the writ should be denied.

We do not know whether it is proper practice or not, but we would like to submit with this brief a copy of our brief filed in the lower court in which we have made an attempt to review all the cases that we were able to find on this question of aggregating or combining the claims of plaintiffs to confer jurisdiction, and we are, therefore, taking the liberty of filing those briefs together with this brief,

especially that part of the brief beginning at Page 48 and following.

Respectfully submitted,

BARNEY E. GASKILL

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Counsel for Respondents and Appellants Below.

SUPREME COURT OF THE UNITED STATES.

No. 139.—October Term, 1941.

Charles M. Thomson, Trustee for Property of Chicago & Northwestern Railway Company, et al., Petitioners,
vs.
Barney E. Gaskill, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 2, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The question for decision is whether the record shows an essential requisite of the jurisdiction of the District Court, namely, that the "matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000". Judicial Code, § 24(1), 28 U. S. C. § 41(1). There were other questions which, in the view we take of the case, need not be stated.

Respondents, forty-one conductors and brakemen employed by the Chicago & Northwestern Railway Company, brought suit against the railroad and one Kimball, an employee of the road, in the United States District Court for the District of Nebraska. The complaint alleged that the plaintiffs "belong to" the trackage of the railroad called the Nebraska Division; that "the controversy arises over the division of seniority rights between the Nebraska Division to which plaintiffs belong, and the Sioux City Division to which the defendant George Kimball belongs, over the Northwestern road from Omaha, Nebraska to Sioux City, Iowa"; that trains running between these points moved over 31 miles of the Nebraska Division and 70 miles of the Sioux City Division; that prior to May 1, 1930, seniority rights of the plaintiffs were governed by certain contracts "referred to sometimes as the 'Schedule of Wages and Rules of Compensation for Conductors and Trainmen' ", which provided that when trains were operated over more than one seniority district, the "percentage of miles run over each division will govern in assignment to such runs"; that since May 1, 1930,

the railroad has assigned all of the work on the Omaha-Sioux City run to the Sioux City Division; that although the railroad insists that the plaintiffs' seniority rights have been abrogated "by an alleged agreement between the said defendant railroad trainmen, and the order of Railway Conductors", the plaintiffs are not bound by such agreement; and that on account of the "wrongful deprivation" of their seniority rights, the plaintiffs have been damaged in excess of $3,000.

The railroad's answer stated that the plaintiffs had only such seniority rights as were derived from agreements between the railroad and the Order of Railroad Conductors and the Brotherhood of Railroad Trainmen; that the agreements could be abrogated or modified by the railroad and the unions without the consent of the plaintiffs; that the track between Omaha and Blair, located on the Omaha-Sioux City run, was not part of the Nebraska Division of the railroad; that this trackage is owned by the Chicago, St. P., M. & O. Railway Company; that the only part of the Nebraska Division on the run between Omaha and Sioux City is 7.5 miles long; and that the complaint did not show the existence of the required jurisdictional amount. The District Court ordered the plaintiffs to prove that more than $3,000 was involved, and ten of them submitted affidavits. The substance of each affidavit was that since May 1, 1930, the Chicago & Northwestern had "operated trains over thirty-one miles of the Nebraska Division in violation of existing contracts", and that "to the best of [affiant's] knowledge and ability", his loss exceeded $3,000. The defendants submitted affidavits supporting the allegations of their answers. But neither the pleadings nor the affidavits of the parties contain the terms of the various agreements referred to in the complaint and upon which the plaintiffs' action is based.

Upon the defendants' motion to dismiss the cause for want of jurisdiction, the District Court held that the pleadings and supporting affidavits established that "the amount in controversy as to any one plaintiff does not amount to as much as $3,000", and that the nature of the suit was not such as to permit aggregation of the claims of all the plaintiffs. Accordingly, the action was dismissed. The first conclusion of the District Court was not challenged either in the Circuit Court of Appeals or before us. The plaintiffs contended that their claims should be aggregated because "the rights of the plaintiffs are so interlocked and interwoven that

the rights of one cannot be determined without the others being parties thereto". The Circuit Court of Appeals reversed the dismissal, holding that the plaintiffs' claims could be aggregated for purposes of determining the value of the matter in controversy. The Court stated that although it found the complaint "very difficult of analysis", it had construed it "most favorably to the pleader, for the purpose of passing on the sole question of jurisdiction raised on the appeal." 119 F. 2d 105, 108. We brought the case here, 314 U. S. —, in view of the important question affecting the jurisdiction of the district courts.

The policy of the statute conferring diversity jurisdiction upon the district courts calls for its strict construction. *Healy* v. *Ratta*, 292 U. S. 263, 270, and see *Elgin* v. *Marshall*, 106 U. S. 578, 580. Accordingly, if a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof. *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 188-89; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 278; *Gibbs* v. *Buck*, 307 U. S. 66, 72. The bill must be dismissed if the evidence in the record does not support the allegations as to jurisdictional amount. And our review of the District Court's determination of the jurisdictional amount must be confined to this record. *Henneford* v. *Nor. Pacific Ry.*, 303 U. S. 17, 19; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 589-90.

Since the record does not contain the various agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit "in which several plaintiffs, having a common undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount". *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 86; see *Shields* v. *Thomas*, 17 How. 3, 5; *Troy Bank* v. *Whitehead & Co.*, 222 U. S. 39, 40-41; *Gibbs* v. *Buck*, 307 U. S. 66, 74-75, or one in which "the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy", *Davis* v. *Schwartz*, 155 U. S. 631, 647; see *Clay* v. *Field*, 138 U. S. 464, 479-80; *Russell* v. *Stansell*, 105 U. S. 303. Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument, *Pinel* v. *Pinel*, 240 U. S. 594, or because the plaintiffs have a community of interest, *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583. In a diversity litigation the value of the "matter

in controversy'' is measured not by the monetary result of determining the principle involved, but by its pecuniary consequence to those involved in the litigation. *Wheless* v. *St. Louis,* 180 U. S. 379, 382; *Oliver* v. *Alexander,* 6 Pet. 143, 147.

The record contains no showing of the requisite jurisdictional amount, and the District Court was therefore without jurisdiction. The judgment will be reversed and the cause remanded to the District Court without prejudice to an application for leave to amend the bill of complaint.

So ordered.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.